# QUARTERLY REPORT
# of the
# ATTORNEY GENERAL
# of
# ALABAMA

For the Period:

From October 1, 1937

Through December 31, 1937

VOL. IX

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TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act of the Legislature of Alabama found on page 1114 of the General Acts of Alabama, Regular Session, 1935, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from October 1, 1937 through December 31, 1937.

The Act referred to above requires that six copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, and the County Superintendent of Education.

The Office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
A. A. CARMICHAEL,
Attorney General.

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# OPINIONS

October 1, 1937

Hon. A. F. Harman, President,
Alabama College,
Montevallo, Alabama

An officer of the United States army who is not a resident of Alabama, who enters a pupil in the Alabama College, comes under the regulations of Section 510 of the Alabama School Code of 1927, which deals with the admission of students from other states.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 8, 1937, in which you request my opinion as follows:

"Under the rules and regulations of Alabama College we charge non-residents who attend the college an out-of-state extra fee of $24.00 per year.

"We are registering this week a student whose father is a lieutenant in the United States army located for the time being at Pensacola. In the circumstances will you kindly express to me your opinion as to whether or not an exemption from the out-of-state fee can be legally granted?"

I also have your letter of September 16, 1937, in answer to my letter of September 14, in which you give additional facts as follows:

"Replying to your letter of September 14th, for which I thank you, it will suffice for our purpose if your opinion will cover officers of the United States army who are **not** citizens of Alabama. It is my information that the lieutenant now stationed at Pensacola is not a citizen of Alabama. We will be able to handle the question proposed if it pertains to citizens of Alabama who are temporarily resident in other states."

I note from your letter of September 16, 1937, that you say the lieutenant now in the United States Army and stationed at Pensacola, Florida, has never been a citizen of Alabama. In this connection, I call your attention to Section 510, Alabama School Code of 1927, which is as follows:

"Section 510. Who May Be Admitted to College.—Any white girl or woman residing in Alabama, of good moral character, in good health, and of sufficient physical and mental development, to be judged of by the President, who shall comply with all the requirements prescribed by the Trustees, may be admitted into the institute, and upon completing the course of study prescribed at the time of her admission, to the satisfaction of the Faculty, shall receive the certificate, diploma, or degree she may have earned. Whenever the accommodations of the institute are sufficient to admit more students than apply from Alabama, then students from other States or Countries may be received and instructed in the institute upon such terms and conditions as may be imposed by the President or Trustees."

In view of the above, I am of the opinion that such Lieutenant comes under the latter sentence of the above section and would be required to enter his daughter in the Alabama College under the same terms and regulations as other non-residents enter theirs. This sentence reads as follows:

"Whenever the accommodation of the institute are sufficient to admit more students than apply from Alabama, then students from other States

or Countries may be received and instructed in the institute upon such terms and condiitions as may be imposed by the President or Trustees."

The fact that such Lieutenant is in the army of the United States can make no difference. The section above quoted makes no such exemptions.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

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October 2, 1937

Hon. Joseph E. Easterling,
County Treasurer,
Chilton County,
Clanton, Alabama.

Acts No. 53 and No. 54, approved February 2, 1937, (Local Acts 1936-1937, Extra Session, pages 36 and 37) do not violate Section 104, subdivision 28 of the Constitution of Alabama. Treasurer of Chilton County may pay appropriations provided by said Acts, without having same passed on by the Commissioners Court of Chilton County.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date in which you state:

"Please refer to my letter to you dated March 24th requesting an opinion as to two local bills of Chilton County, which were passed at the last session of the Legislature for the relief of J. T. Rockett and W. G. Culp, ex-Tax Collectors of Chilton County, Alabama, a copy of which was sent you with that letter."

You request my opinion:

(1) "I wish to ask whether or not in your opinion these bills violate Section 104, subdivision 28 of the Constitution.

(2) "I further wish to ask your opinion as to whether or not it will be necessary for a claim to be filed with the Court of County Commissioners before these claims are paid, or whether I have the right, as Treasurer, to pay the same without it being passed by the Commissioners Court."

It is my opinion that your first question should be answered in the negative. Section 104, subdivision 28 of the Constitution provides as follows:

"Section 104. The legislature shall not pass a special, private, or local law in any of the following cases:

* * * *

(28) Remitting fines, penalties, or forfeitures."

Section 1 of Act No. 53, H. 187, approved February 2, 1937. (Local Acts 1936-1937, Extra Session, p. 36) provides as follows:

"Section 1. That the sum of $132.99, which sum was paid by J. T. Rockett, Ex-Tax Collector of Chilton County, Alabama, to the State of

Alabama for the use of Chilton County, Alabama, and which sum represents interest charged against him on taxes collected by him as Tax Collector of Chilton County, Alabama, and on which he received no benefits, be, and the same is hereby appropriated out of the General Fund of Chilton County, Alabama, and the Treasurer of Chilton County, Alabama, is hereby authorized, empowered and directed to pay to the said J. T. Rockett out of the General Fund of Chilton County, Alabama, the said sum of $132.99."

Section 1 of Act No. 54 H. 188, approved February 2, 1937, (Local Acts 1936-1937, Extra Session, p. 36) is as follows:

"Section 1. That the sum of $102.34, which sum was paid by J. T. Rockett, Ex-Tax Collector of Chilton County, Alabama, to the State of Alabama for the use of the Board of Education of Chilton County, Alabama and received by the Board of Education of Chilton County, Alabama, same being paid as interest on taxes collected by said J. T. Rockett while Tax Collector of Chilton County, Alabama, and on which funds said J. T. Rockett received no benefits, be, and the same is hereby appropriated out of the General School Fund of Chilton County, Alabama, and the custodian of said School Funds in Chilton County, Alabama, is hereby authorized, empowered and directed to pay to said J. T. Rockett out of the General School Funds of Chilton County, Alabama, the said sum of $102.34."

A fine is defined as "a sum exacted as a penalty for an offense—to set a fine by judgment of a court; punish by fine."—See **Hudson v. State,** 129 So. 106, 99 Fla. 102; **State v. King,** 119 So. 252, 167 La. 350; **State v. Price,** 50 So. 794, 124 La. 917; **State v. Hubert,** 103 So. 742, 158 La. 209; 25 Corpus Juris, 1148.

A penalty is defined to be: "Penal retribution; punishment as a fine, for a crime or offense." "A forfeit to which a person binds himself in default of fulfilling stipulations; forfeiture, fine." See **Miller v. Bopp,** 67 So. 831, 136 La. 788; 25 Corpus Juris, 1148.

Forfeiture is defined to be: "Act of forfeiting." "That which is forfeited; a penalty; fine; mulct." See **State v. Baltimore** (Md); 38 American Decisions, 319; 25 Corpus Juris, 1148.

Section 8564, Code of 1923, provides in part as follows:

"All contracts, express or implied, for the payment of money, * * * bear interest from the date such money, * * * should have been paid * * *"

Interest is defined as a "premium for the use of money, usually reckoned as a percentage."—See **Dismukes v. Weed,** 203 Ala. 64, 82 So. 24; **Hogan v. Limestone County,** 160 Ala. 544, 49 So. 417.

In the case of **Sparks v. Lowndes County,** 25 S. E. 426, 98 Ga. 284, the Supreme Court of Georgia, construing a Georgia statute, which provided that "all executions issued for taxes due the State or any county thereof, or any municipal corporation therein, * * * shall bear interest at the rate of seven per cent per annum from the time fixed by law for issuing the same," said "We do not think the interest provided by the Act, supra, is to be regarded as a penalty. A penalty is a punishment, and interest is merely a compensation for the use or forbearance of money."

In the case of **City of New Whatcom v. Roeder,** 61 Pac. 767, 22 Wash. 510, the Supreme Court of Washington said:

"In the face of these provisions, we are not justified in assuming that the legislature, at its session of 1899, used the term 'penalty' in the same sense as it used the word 'interest'. Different meanings must be given to the words used, and they must be the meanings attaching to the words in other acts in pari materia, some of which we have cited. In considering our revenue statutes, the terms 'penalty' and 'interest' have been given definitions by our legislature, and those definitions have been applied in a practical way in the execution of the different revenue statutes."

Section 202 on page 114 of the 1935 Revenue Act provides a penalty for the failure of a tax collector to turn over funds or make settlements.

Section 395 of the 1935 Revenue Act is as follows:

"Section 395. Any Tax Collector who fails to make return and forward the tax money in his hands, from time to time, to the proper authorities, as provided by law, except for good cause, is guilty of embezzlement of public funds, and is liable, on conviction to a fine of not exceeding ten thousand dollars ($10,000.00) and imprisonment in the penitentiary not exceeding two years."

I am familiar with the recent case of State v. French, 224 Ala. 234, 139 So. 328, in which Justice Knight, speaking for the Court, held that a statute which directed a county treasurer to pay persons amounts they paid as sureties in satisfaction of a bail bond forfeiture judgment, was unconstitutional, as a special or private law remitting penalties or forfeitures.

Under the facts in this case the funds were to be paid for the remission of a penalty or a forfeiture, while under our facts, it is my opinion that the money is to be paid for interest charged which was merely for the use of the money and was in no sense a fine, penalty or forfeiture.

The premises considered, it is therefore my opinion that Acts No. 53 and No. 54, approved February 2, 1937 (Local Acts 1936-1937, Extra Session, pages 36 and 37) do not violate Section 104, subdivision 28 of the Constitution of Alabama.

Answering your second question, it is my opinion that it will not be necessary for these claims to be presented to the Court of County Commissioners for allowance or rejection as the Local Acts in question determine the fact and amount of the claim and the mode of dealing with the same.

In the case of **Miller v. Paris,** 145 Ala. 494, 39 So. 658 the Court said:

"Where special laws in express terms or by necessary implication provide for a different mode of dealing with such claims, that mode is, of course, to be followed, though in derogation of the general statutes and policy of the state."

In **Caldwell v. Dunklin, 65 Ala.** 461, the Court said:

"And, again, where the law itself determines the fact and the amount of the claim, leaving nothing to be ascertained or determined by the county board, it is generally held that presentment for audit, and allowance or rejection is not contemplated nor required."

The premises considered, it is therefore my opinion that you, as Treasurer, may pay these claims without having them passed on by the Court of County Commissioners of Chilton County.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

October 2, 1937

Hon. Charles W. Lee,
State Comptroller,
Capitol.

The fee provided for the Clerk of the County Courts. Act No. 225, House Bill 71 by Merrill, pertaining to preliminary investigations before the County Court, does not authorize the payment of the fee therein provided by the State or Convict Department.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 8, 1937, in which you request my opinion as follows:

"The items of cost and the amount of each item paid by the Convict Department in hard labor and penitentiary cases are authorized by Section 3667 of the Code of 1923.

"Should the Convict Department pay the two dollars ($2.00) clerk fee as set out in House Bill No. 71, approved March 2, 1937, General Acts 1937, page 268, or is the two dollar ($2.00) fee an item of cost to the defendant not payable by the Convict Department?"

In answer to your inquiry, I am of the opinion that the $2.00 fee in question is an item of cost chargeable to the defendant under House Bill No. 71, approved March 2, 1937, General Acts of 1937, page 268, but is not such an item as is payable by the Convict Department. Section 3667 of the Code of 1923 provides what fees are payable by the Convict Department on the conviction and delivery of a convict to the penitentiary authorities and the Act referred to above does not in any wise amend this Section. It is true the Section referred to by you provides that the Clerk may charge this fee, yet it does not provide for its payment by the State, and in my opinion, this can only be done by amending Section 3667, supra, which Section is as follows:

"3667. Costs of conviction; items to be paid.—Whenever a defendant is convicted, and sentenced to the penitentiary the following items of costs in the case shall be paid out of the convict fund, to the extent and in the manner hereinafter prescribed, to wit: for issuing each capias or warrant (once), fifty cents; docketing cause, ten cents; issuing each subpoena for state's witnesses, twenty-five cents; each undertaking or recognizance, and entering same, fifty cents, trial, fifty cents; entering judgment, twenty-five cents; final judgment twenty-five cents; record for supreme court (per hundred words), fifteen cents; making final record (per hundred words), fifteen cents; making transcript and certificate thereof (per hundred words), fifteen cents; entering forfeiture against defendant, fifty cents; sheriff's fees, executing each warrant or writ of arrest, four dollars; approving bond, one dollar; serving each subpoena for state witnesses, fifty cents; for committing prisoners to jail, one dollar; for summoning jury in capital cases, three dollars; state witnesses' fees, which are fixed at seventy-five cents per diem before the grand jury and seventy-five cents per diem before the court of conviction, and five cents per mile for each mile traveled to and from the grand jury and court of conviction, but no witness shall be entitled to fees in more than one case on the same day; cost of committing magistrate and constables on preliminary trial, both together not to exceed five dollars; court stenographer's fee not to exceed three dollars; and when the conviction is secured by a solicitor other

than a solicitor who is paid a salary by the state, or when the solicitor is paid a salary by the county, such bill of costs shall also include the solicitor's fee, which is now or may be allowed by law."

I might call your attention to the fact that in printing the Code of 1923 a typographical error appears in the above section where it says "costs of committing Magistrate and constable or preliminary trial, both together not to exceed five dollars." The word **or** should be **on**, as this is the way it appears in the Code as adopted now on file in the Secretary of State's office. So in copying the section I made the correction, substituting **on** for **or.**

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

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October 5, 1937

Hon. Madison L. Smith,
Tax Assessor,
Washington County,
Chatom, Alabama.

Taxation—Homestead—Act No. 107, General Acts 1936-1937, p. 113.

1. Homestead exemption from state taxes is not granted unconditionally by Act No. 107, supra, but is dependent upon exemptioner's assertion of claim therefor.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry, which I quote as follows:

"Does the law within itself exempt the head of the family 160 Acres of land, valued up to $2,000.00 or does the head of the family have to set up a claim with the tax assessor before he is entitled to his exemption?

"If a claim is required to be made by the taxpayer in order to get his exemption, can his claim be signed by some one who has knowledge of his property as agent, or in case the taxpayer is sick and can't come to make his claim, can some one sign for him as agent?"

The Legislature provided by Act No. 6, General Acts of 1936, p. 4, approved March 12, 1936, that homesteads be separately listed and valued, thus evidencing an intention that the exemptioner shall perform some assertive act for his homestead exemption. In my judgment, it was not the intention of the Legislature, manifested by the adoption of this Act, that the law granting the homestead exemption should be self-executing to the extent that the exemptioner is under no obligation to do or perform an assertive act in pursuit of the gratuity which the Legislature offered.

To hold otherwise would lead to endless and unnecessary confusion in determination of homestead rights. The tax assessor would be required to check every piece of property assessed for taxation, or subject to taxation, for the purpose of determining whether or not the assessed property, or any portion thereof, is used as a homestead. The purchaser of property at a tax sale would not know at the time of purchase whether the property is a homestead. Sales of property for payment of taxes would be greatly impeded be-

cause of the uncertain use of the property. There would be endless confusion in determination of titles. I, therefore, conclude that the Legislature imposes upon the exemption a mandate to the taxpayer that he must assert his claim therefor, or failing therein, that he waives the tax gratuity.

The Act granting the exemption was not approved by the Governor until February 20, 1937, and the application thereof to current taxes was not determined until the Supreme Court of Alabama held that it was effective for the tax year 1936-1937. In Re: **Opinion of Justices,** 175 So. p. 690. When the Act was approved the tax assessments had already been finished. Logical inference may be drawn that the Legislature intended that the taxpayer should be permitted to amend his tax return by separately listing and valuing his homestead. The procedure employed to amend the tax return amounts to an assertion of the taxpayer's claim for homestead exemption. No claim could have been filed before February 20, 1937.

The homestead claim for this current tax year may be asserted by filing with the tax assessor a verified description and valuation of the homestead.

Your second question has been answered affirmatively in an opinion of this office to Hon. John M. Graham, Tax Assessor, Jackson County, Scottsboro, Alabama, dated September 20, 1937, and by another opinion of this office to Hon. John J. Flowers, Tax Assessor, Montgomery County, Montgomery, Alabama, dated September 22, 1937. Copies of both opinions have been sent you.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

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October 6, 1937

Board of Revenue,
Barbour County,
Eufaula, Alabama.

County may not pay from gasoline tax receipts for city paving which was done seven years ago unless such revenues were pledged for payment of bonds issued for such paving.

Opinion by Assistant Attorney General Knabe.

Gentlemen:

I have your letter of September 23, 1937, in which you request my opinion as follows:

"The Court House of Barbour County at Clayton is located on the west side of the 'Public Square;' and the County jail is located on Midway Street. Some years ago, the Town Council of Clayton passed an appropriate ordinance providing for the paving of the Public Square, and the streets leading out therefrom. The Court House and jail were both in the paving area, and the streets in front of them were duly paved, with as assessment against the County for its share of the paving cost, payable in ten annual installments. Seven installments have been paid by the County, and there is due three remaining installments all unpaid.

"The amount due on the Court House being due of $1032.46. The amount due on the jail is $425.06.

"The County has not sufficient funds with which to pay the said amounts, other than gas tax receipts, and we submit to you the question—as to whether this paving assessment can be paid out of gasoline tax receipts of the County, in view of the act of the Legislature of Alabama approved March 4th, 1937, page 179, Session of 1936-37, or any other act or law pertaining to the same."

The Act approved March 4, 1937, 1936-37 Acts of the Legislature, p. 179, to which you refer, provides that the Gasoline Tax "shall not be used for any purposes other than the construction, improvement, and maintenance and supervision of highways and bridges and streets, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes." From your statement of facts, the only obligation of the county arises from the so-called "assessment" which was made against the county some seven years ago. An "assessment" cannot be made against the county in such a way that a personal judgment may be secured, **City of Huntsville v. Madison County,** 166 Ala. 389, 52 So. 326, and "contributions" to street paving programs are "voluntary". **Smith v. Franklin County,** 221 Ala. 136, 127 So. 904.

Such contributions are not, in my opinion, included in the purposes for which the gas tax may be expended as set forth in the above quoted Act, and I am, therefore, of the opinion that the gasoline tax receipts may not be used for the paving you mention.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

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October 6, 1937

Hon. T. V. White,
Clerk, Board of Revenue,
Sumter County,
Livingston, Alabama.

Three Mill District School Tax—Duty of Board of Revenue.—Alabama School Code of 1927, Section 280.

Where electors vote to require levy of special three-mill district school tax, Board of Revenue must declare result of election and cause Tax Assessor to assess the same. Duty of Board of Revenue unaffected by any agreement of County Board of Education.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 13, 1937, in which you request my opinion as follows:

"The Board of Revenue respectfully requests your earliest possible opinion on the following matter.

"The enclosed contract is a copy of a contract entered into by the Sumter County Board of Education and the Allison Lumber Company

which your office held to be a valid contract in 1933 in an opinion to the State Supt. of Education requested by the Sumter Co. Supt. of Education.

"At the request of the Sumter Co. Board of Education the Board of Revenue of Sumter County called an election and submitted to the voters the issue embraced in the enclosed ballot, and the election carried for consolidation and taxation. The consolidation and taxation voted on by the people covers the area specifically mentioned in the enclosed contract in which the Board of Education had previously contracted not to include in the taxing districts and not to include in any requests for election for school district taxation for the period stipulated and which has not expired.

"The County Supt. of Education after the canvassing of the election returns appeared before the Board of Revenue and requested the Board when it made its levy to exempt from the levy the territory embraced in the contract.

"The Board of Revenue therefore requests of you in writing an opinion specifically setting forth the Board of Revenue's legal duty under the circumstances.

"Inasmuch as a fiscal year is at hand and the Board as well as the Tax Assessor and Collector must take action appropriate to your opinion, a return mail opinion becomes highly desirable. If further details are necessary to your opinion please get in touch with us immediately and they will be gladly furnished."

Under the contract referred to, the Sumter County Board of Education agreed that in consideration of certain payments made toward the expense of erecting a high school, for which payments the Allison Lumber Company was not obligated, that it, the Board of Education, would not include other properties of the lumber company within districts on which a three-mill tax was levied, and further agreed that for a period of ten years it, the County Board of Education, would not request an election to be held in the beat in which said Allison Lumber Company owned a large tract of property. It is further my understanding from you that this contract has been enforced for nine years and only has one more year to run. However, the County Board of Education requested the Board of Revenue to call an election submitting to the voters of the districts involved the question of consolidation with other districts and the levying of a special three-mill school tax.

Upon the canvassing of the election returns, it appeared that both issues, for consolidation and taxation, were passed by the boards. It thereupon becomes the duty of the Board of Revenue of Sumter County to proceed as required by Section 280 of the Alabama School Code of 1927. Under this section it is the duty of the Board of Revenue to levy said special tax and cause the tax assessor to assess the same on the taxable property involved. In my opinion, the agreement of the County Board of Education with the Allison Lumber Company not to request an election in the district involved can in no way effect the right and the duty of the Board of Revenue, and the Board of Revenue has no authority to exempt from the taxes levied the territory embraced in the contract.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

October 6, 1937

Hon. J. B. Van Valkenburgh, Chairman,
Madison County Board of Commissioners,
Huntsville, Alabama.

County—Liability thereof for tort—

1. Under facts stated, county not liable for tort of employee and Court of County Commissioners has no authority to pay damages therefrom.

2. County not liable for damages arising from negligent maintenance of highway.

3. County not liable for injury sustained on a bridge unless negligence and statutory requirements imposing liability on county concur.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 21, 1937, in which you request my opinion as follows:

"Kindly inform us as to whether it is your opinion that the following claims that have been filed with and approved by our Board, can be legally paid by them:—

"1. Pick-up truck driven by county employee, Potts, going east on the road, and car belonging to Miss Allie Hall driven under the supervision of her brother who was riding in the car at the time, collided. Evidence introduced before this Board showed that negligence existed on the part of both drivers. This accident occurred in the day time. Damages approved amounted to $40.00.

"2. Mr. E. D. Howard, operating his father's car, ran over a large pile of dirt which was being used as a barricade on a culvert excavation, and caused damage to his car to the extent of $25.00. This excavation had been across the road for about six weeks and it was common knowledge that this excavation existed, and this embankment was clearly visible for 400 or 500 yards away. This accident occurred at night time.

"3. Another case of this kind, was of a boy riding a horse that stepped in a hole in a county bridge and the horse had to be destroyed because of the injury resulting. Damages amounting to $40.00. This accident happened at night time.

"Our County Attorney is of the opinion that these claims cannot be legally paid, but in order to satisfy the parties involved, we are asking that you give your opinion on them."

In answer to your first inquiry, it is my opinion that this claim cannot be legally paid. You do not give me any information as to the scope of employment of the county employee in question, Potts. Ordinarily, even where authority to sue a governmental agency of the State is given by statute, such authority does not extend to suit upon a tort for damages. **White vs. Insane Hospital,** 138 Ala. 479, Biennial Report of the Attorney General, 1926-28, page 730. Regardless of this, however, under the facts stated by you, it appears that both parties were at fault and, therefore, the claimant is barred from any recovery by contributory negligence. It is therefore my opinion that any

payment on the claim would be a mere gratuity on the part of the County, and since there is no statutory authority for a court of county commissioners to spend county funds gratuitously, the claim in question cannot be legally paid.

2. Your next inquiry involves the liability of the county for negligence in maintaining a highway.

> "County authorities exercise a quasi legislative authority, and, in the absence of a statute expressly declaring liability, the county cannot be made answerable for damages resulting from the unskillful or negligent manner in which the highway is constructed or maintained. Askew v. Hale County, 54 Ala. 639, 25 Am. Rep. 730, Lee County v. Yarbrough, 85 Ala. 590, 5 So. 341, Barbour County v. Horn, 48 Ala. 649, Brown v. Shelby County, 214 Ala. 252, 85 So. 416." Per Sayre, J., in Barbour County v. Reeves, 217 Ala. 415, 116 So. 119.

It is therefore my opinion that this claim cannot be legally paid. I pretermit any discussion of the question of contributory negligence.

3. Your last inquiry is as to the payment of a claim for an injury to a horse resulting from a hole in a county bridge. You do not advise me whether this bridge was constructed by the county, whether the bridge was constructed by a contractor who gave a bond, or whether the bridge was constructed by a contractor without a bond. These might be material questions. It has been many times decided that the county is not liable for damages resulting from negligence in maintaining a bridge except under a statute expressly declaring such liability. **Barbour County v. Reeves,** 217 Ala. 415, 116 So. 119; **Hovater v. Franklin County,** 217 Ala. 439, 116 So. 526. On the other hand, the county is liable under certain circumstances when the bridge is constructed by independent contractors. Section 6457, Code of 1923. It is therefore my opinion that if the bridge in question was constructed by the county, there is no liability upon the county for the injury to the horse.

In the event the bridge was constructed by an independent contractor under such circumstances that the county might become liable therefor under the provisions of Section 6457 of the Code of 1923, there would arise the further question of whether or not the county was negligent. I advise you that, in my opinion, the county is not liable for this injury unless there was negligence on the part of the county officials, concurring with the statutory requirements imposing liability on the county. Quarterly Reports 4, page 5.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

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October 6, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

County Board of Education—

1. Not authorized to pay elective Superintendent extra compensation for handling free text books, in the absence of substantial new and additional duties.

2. May make an allowance to Superintendent for expense of handling free text books.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

The first three inquiries made in your letter of February 23, 1937, have been answered in an opinion of this office to the County Superintendent of Education of Perry County, dated September 23, 1937. The balance of your letter reads as follows:

"On September 5th, 1935 the County Board of Education of Perry County passed the following resolution:

"'Upon the recommendation of the Superintendent the contract formerly held with the Board by Perry County Oil Company to furnish gasoline and oil to the Bus drivers was cancelled and the policy of the Board to continue to furnish gasoline and oil for the bus drivers be discontinued until such time as such arrangements would be profitable to the Board. THE SUPERINTENDENT WAS AUTHORIZED, EMPOWERED AND DIRECTED TO USE THE COMMISSION TO BE PAID TO THE BOARD BY E. E. FORBES AND COMPANY FOR THE HANDLING BY THE SUPERINTENDENT OF THE FIRST GRADE BOOKS THIS YEAR BE USED BY HIM AS OFFICE EXPENSE.'

"1. Has the County Boards of Education authority to pay Elective Superintendents extra compensation for handling the Free Text Books?

"2. If the County Boards of Education have not the authority to pay Elective Superintendents such extra compensation, and the Superintendent has received the compensation, is not the amount so received a legal charge against his official bond?

"The action of the County Board of Education on September 5th. 1935 was based on a conversation the Superintendent had with the State Department of Education. This conversation was confirmed in a letter from the Department of Education addressed to County and City Superintendents, dated January 11, 1936. A copy of this letter is attached here to."

Your first inquiry is whether the County Board of Education has authority to pay elective superintendents extra compensation for handling free text books. In the case of **McMurray v. Board of Education of Franklin County,** 216 Ala. 144, 112 So. 644, the Supreme Court held that the salary of an appointed superintendent of education could not be raised during his term of office without violating Section 281 of the Constitution. In my opinion, the same rule would apply to the salary of an elective Superintendent of Education whose salary was fixed by the Board of Education pursuant to Section 149, Alabama School Code of 1927. In **McElderry v. Abercrombie,** 213 Ala. 289, 104 So. 671 and **Taylor v. Davis,** 212 Ala. 282, 102 So. 433 it was settled by the Supreme Court that extra compensation for services in performance of substantial new and additional duties may be granted by the legislature without violating the Constitutional prohibition. The "free text book Act," General Acts of 1935 page 594, places no additional duties on County Superintendents of Education. Whether such substantial new and additional duties have been placed upon them by the Board in administering the Act, does not appear from your letter. In the absence of such additional duties as would bring the case under the holding of **McElderry v. Abercrombie,** supra, it is my opinion that the County Board of Education has no authority to pay an Elective Superintendent extra compensation for handling the Free Text Books. If such

Superintendent receives extra compensation to which he is not entitled, the amount so received is a proper charge against his official bond.

However, it seems to me that this question of extra compensation is not involved from the facts set out in your letter. The resolution of the County Board of Education of Perry County did not make provision for "extra compensation" but merely authorized the Superintendent to use the funds "as office expense." In an opinion of this office to the Hon. R. B. Carr, (Quarterly Reports, Vol. II, p. 161, 163,) the distinction between "compensation" and "allowance for expense" was thoroughly considered and discussed. Such an allowance for incidental expenses is not within the constitutional provision against increase of compensation.

Quarterly Reports II, pages 161 and 163 and cases cited.

**Kirkwood v. Soto,** 87 Cal. 394, 25 Pac. 488.

**Fergus v. Russell,** 270 Ill. 304, 110 N. E. 130.

**Ware v. Battle Creek,** 201 Mich. 468, 167 N. W. 891.

Of course, the Superintendent must account for all such funds coming in to his hands. (School Code of 1927, Sec. 147). If he appropriates any part of the funds to his own use as additional compensation, he exceeds the authority granted him under the resolution to use such funds "as office expense", and any amount so misappropriated would be a proper charge against his official bond. If the Superintendent uses the fund in question only in defraying office expense, and properly accounts there for, in my opinion he is authorized to do so and would not be liable on his official bond for the amounts so expended for office expense.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

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October 6, 1937

Hon. T. B. Smith,
Register Circuit Court,
Sumter County,
Livingston, Alabama.

Where a party is cited for contempt for failing to pay alimony formerly decreed against him, this citation does not carry a trial tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 27, 1937, in which you request my opinion as follows:

"I wish you would give me a ruling on the following case as to whether I should collect a trial tax or not.

"A year ago there was a divorce case filed and alimony asked. The decree was granted and alimony given. The defendant paid the alimony for several months and then quit. The complainant then comes in and files a petition asking that the defendant be cited to appear and show

cause why he had quit complying with the decree. I construed that the trial tax should be collected as it went on the docket as a new case."

I am of the opinion that where a party in a divorce suit has had alimony adjudged against him and fails to comply with the terms of the decree granting alimony and is cited by the court to show cause why he should not be adjudged in contempt for such failure to comply with the court's decree, there can be no trial tax assessed for the reason that this, in my opinion, is purely an ancillary proceeding which is put in operation to force compliance with said decree which was granted in the original suit.

2 C. J. 1336 defines "ancillary suit" as "an action in aid of the execution at law and which is in effect a continuance of the suit at law to obtain the fruit of the judgment or to remove the obstacles of its enforcement."

In 1 Words and Phrases, page 451 (3rd Series), it is stated that an "ancillary suit" in equity is one growing out of a prior suit in the same court pending upon or instituted for the purpose of either impeaching or enforcing the judgment or decree in a prior suit, and the jurisdiction of said suit is dependent upon the jurisdiction of the court of the prior suit.

From the above authority I think the matter that you have is clearly an ancillary proceeding attempting to enforce the original decree and, therefore, does not carry a trial tax.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

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October 7, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Costs—Sections 8684, 5287, 6670 and 4039, as amended by General Acts, 1927, page 45, Code of Alabama, 1923.

1. Court is without lawful authority to impose belated sentence upon prosecutor who was not presently sentenced for failure to pay court costs taxed against him.

2. Bond of Circuit Clerk who fails to issue lawful execution for costs taxed against prosecutor is liable for damages accruing by reason of such failure.

3. Fine and forfeiture fund of county is not chargeable with uncollectible costs taxed against prosecutor.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date which is as follows:

"Please refer to Section 4039, Code of 1923, as amended by General Acts, 1927, page 45, and advise me as follows:

"(1) Can the prosecutor in such cases, at a later date, be brought into court and sentenced to jail for ten days?

"(2) Would the Circuit Clerk and his bond be liable for the amount of cost taxable to such prosecutor by his failure to issue an execution?

"(3) In the event execution for cost was properly issued, would the fees of the officers of the Trial Court be a proper claim against the Fine and Forfeiture Fund upon the return of the execution (no property found)?"

I am of the opinion that a court is without lawful authority to impose a belated sentence upon a prosecutor who was not presently sentenced for failure to pay court costs taxed against him.

Section 5287, Code of Alabama, 1923, requires the court to imprison in the county jail, or to sentence to hard labor for a period of ten days, any prosecutor who presently fails to pay court costs taxed against him. If such delinquent prosecutor is released without imposition of the ten day sentence, the court has no authority to invoke the aid of Section 6670, Code of Alabama, 1923, to the end that the prosecutor may be so sentenced. The release of the prosecutor from custody, in my judgment, is tantamount to a discharge. The prosecutor cannot lawfully be taken again into custody for the purpose of imposing a judgment or sentence which should have been imposed before his release from custody. The court has no lawful authority to set aside a judgment taxing costs against the prosecutor for the sole purpose of entering a new judgment which inflicts penal punishment authorized by the statute. The original judgment was not void, but was valid and binding upon the state and the defendant.

Referring to your second question, the clerk of the circuit court, upon failure to issue lawful execution for the purpose of collecting a judgment for costs entered against the prosecutor, would be liable for damages accruing by reason of such failure. See opinion of this office to Hon. Chas. W. Lee, Comptroller, July 19, 1935, Book A, p. 228.

I know of no law which permits uncollectible costs taxed against a prosecutor to be paid out of the fine and forfeiture fund of the county. Section 4039, Code of Alabama, 1923, as amended by an act approved February 18, 1927 (General Acts, 1927, p. 45) does not authorize such payment. Therefore, your third question should be answered in the negative.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

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October 7, 1937

Hon. W. A. Austin, Sheriff,
Elmore County,
Wetumpka, Alabama.

Sheriffs—Elmore County Local Act 1935, page 24, held to provide for $2.00 per day sheriff's fee for attending session of the Inferior Court of Elmore County.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter in which you request my opinion as follows:

"I am Sheriff of Elmore County and wish to make an inquiry of you. Under Section 3758 of the Code of Alabama of 1923 it is provided that a sheriff gets $2.00 per day for attending County Court. Under the provisions of a Local Act of Elmore County that was approved on May 29, 1935 (1935 Local Acts, p. 24) the County Court of Elmore County was abolished and the Inferior Court of Elmore County was established and substituted therefor.

"I wish you to render me your opinion as to whether or not I am entitled to the $2.00 per day for attending said Inferior Court of said County. If I am entitled to such pay per day for attending said Inferior Court, who should pay the same, and how am I to get it?

"I shall appreciate your reply and opinion."

In reply I wish to advise you that in my opinion the Sheriff of Elmore County is entitled to collect $2.00 per day for attending the Inferior Court of Elmore County as provided for in the Local Acts of 1935, page 24, Section 6, which you will note provides as follows:

"Section 6. The Sheriff of Elmore County shall, in person, or by deputy, be required to attend upon the said court and to preserve order and execute all writs or process issued therefrom, and to perform such other duties in all respects as he is required by law to perform in the Circuit Court of Elmore County; and for such services of attending said court the Sheriff shall receive the sum of Two Dollars per day payable out of the fine and forfeiture fund on warrant of the Clerk of the said court; and for all services rendered by him, other than attendance upon the court hereinabove provided for, he shall receive the same costs and fees as are allowed by law for similar services performed and done in the Circuit Courts."

You will note that the $2.00 per day provided for by this Section is payable out of the fine and forfeiture fund on warrant of the Clerk of the Inferior Court of Elmore County.

This Section it seems to me, is unquestionably intended to provide the fee of $2.00 per day for the Sheriff's attendance at the said court. I do not here pass upon the constitutionality of this Act.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

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October 7, 1937

Hon. Ed. Miller, Sheriff,
Blount County,
Oneonta, Alabama.

Money seized in a raid on a game of poker played with cards is not contraband and forfeited.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 22, 1937, in which you request my opinion as follows:

"Please advise me as to what disposition I should make of money seized in a raid on a poker game as five of the men that were gaming were arrested by me, and came into open Court entering their pleas of guilty of gaming as charged in the complaint that I made against each of them. They were assessed a fine of $20.00 each and the costs. The fine and cost being paid, the defendants were discharged.

"I seized $60.00 in money that was on the table where they were gaming, and have deposited this money in the bank until I can find out as to what the law is in regards to money seized in a game where gambling is going on. One of the defendants has requested or made demand on me that I return the money to him."

I find no law or statute that makes this money contraband and forfeited. The money itself is not a gambling device but is simply the consideration for the game.

In the State of Oklahoma it is held—"money is not subject to seizure as an article or apparatus suitable to be used for gambling purposes." **Miller v. State,** 46 Okla. 674. (149 Pac. 364). The money should be returned to the owners.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

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October 7, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Section 382 of the Revenue Code of 1935, held to apply only to Court costs assessed against the State arising in cases involving license or ad valorem taxes.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of September 2, 1937, in which you request my opinion as follows:

"Does Section 382 of the 1935 Revenue Code apply to all manner and kind of cost bills filed for payment with the State or does it apply only to cost bills involving court cost growing out of litigation in tax appeal cases."

In repy, I wish to advise you that in my opinion, Section 382 of the Revenue Code of 1935, applies only to costs assessed against the State in cases involving tax or license matters, in which the State as well as the various taxing subdivisions thereof, have an interest in the revenue derived when said licenses or taxes are collected. Quarterly Report of the Attorney General, Vol. 6, page 30. You will note that this section is a part of Article 14, Chapter 2 of the Revenue Code which deals with the subject of a lien for taxes. The tax matters herein discussed apply exclusively to taxes assessed by the State and the various taxing sub-divisions thereof, and do not in any manner deal with costs arising in the trial of cases in court other than those directly connected with tax matters or license matters.

I wish to further call your attention to the fact that Section 382 above referred to, provision is made for the proration of these costs which are assessed against the State to be paid by the State and the various taxing sub-divisions thereof, in proportion to the amount of taxes levied by each. In my judgment, this provision contemplates that each of the taxing sub-divisions would benefit from the collection of these taxes if the same were collected, and when suit is instituted or legal proceedings had in an effort to collect the same, then the intention of the legislature seems to be clear that each of the taxing sub-divisions which would benefit in case the taxes were collected must bear its proportionate share of the costs assessed in the case upon failure by the State to collect the same by the legal procedure instituted.

The premises considered, it is therefore my opinion that Section 382 of the Revenue Code of 1935, is meant to apply only to those cases in which revenue may be collected by the State and the various taxing sub-divisions thereof. It is further my opinion that since the subject matter here concerned is confined to taxes in the nature of ad valorem or license taxes, that the court costs contemplated by this section apply only to cases in which the costs are assessed against the state upon failure of litigation involving the collection of taxes in which both the State of Alabama and one or more of its various taxing sub-divisions have an interest.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 7, 1937

Hon. J. H. Sims,
Judge of Probate,
Bullock County,
Union Springs, Alabama.

Court of County Commissioners—

May pay district's expenses of maintaining and building roads in excess of appropriation for current year and charge against appropriation for succeeding year.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 20, 1937, requesting my opinion as follows:

"County Commissioner's of Bullock County wish an opinion viz:

"On October 1st, 1936, an appropriation for each district (of which Bullock County has four) to the amount of $15,000.00 was made for each district to maintain and build roads. In July, 1937, an additional appropriation was made for each district to the amount of $6500.00. In September one district has spent more than the amount appropriated. Would it be legal to pay the bills of this district and charge against appropriation for 1937-38 out of revenue of 1936-37 Gasoline Tax?"

It has been several times ruled by this office that the Budget Act is not applicable to the Gasoline Tax Fund. Quarterly Reports, 5, page 32, page 38. I know of no statute which would prevent the Court of County Commissioners

paying the legal bills of a road district of the county and charging the same against the appropriation for the coming year. In my opinion, therefore, it would be legal for you to pay the bills of this road district and charge the same against their appropriation for 1937-1938 out of the revenue for the 1936-1937 Gasoline Tax.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 7, 1937

Hon. Chas W. Lee,
State Comptroller,
CAPITOL.

Under facts as stated, Probate Judge not required to pay for the printing of certain forms in the books of permanent record supplied by the county governing body.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"Section 7285 of the Code of 1923 provides that Probate Judges are entitled to a fee of fifteen cents per hundred words for recording deeds and mortgages.

"The County governing body purchases the volumes as permanent records in which these records are made."

You request my opinion as follows:

"If for the convenience of the Probate Judge, certain forms, as used by local business firms, are printed into these volumes supplied by the county, should the Probate Judge pay for the printing?"

In my opinion your question should be answered in the negative.

Section 9604 of the 1923 Code of Alabama provides as follows:

"Section 9604. STATIONERY OF OFFICERS PAID FOR BY COUNTY.—The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed **reasonable expenses, for suitable books,** stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county."

In my opinion, at the present time a suitable book for recording papers is one in which there are as many printed forms as possible, thereby adding to the efficiency of the office by expediting the work.

The premises considered, it is therefore my opinion that the Probate Judge should not have to pay for printing the forms in the record books.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 7, 1937

Hon. Fred H. Price,
Clerk of the Circuit Court,
Autauga County,
Prattville, Alabama.

1. Where a defendant is convicted for treating human beings of diseases without first having a certificate of qualification from the State Board of Medical Examiners, this is not a violation of the revenue law.

2. The Solicitor's fee in a case where the party is charged with practice of medicine or treating human beings without first obtaining a certificate of qualification from the State Board of Medical Examiners is ten dollars.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 11, 1937, in which you request my opinion as follows:

"Your opinion is requested on the following case:

" 'A. B. made affidavit before the Judge of the Civil and Criminal Court, Autauga County, Local Acts, 1935, page 82, that C. D. did treat, or offer to treat diseases of human beings in Autauga County, in this State, without first having obtained a certificate of qualification from the State Board of medical examiners, as by law required, against the peace and dignity of the State of Alabama. C. D. made answer to the charge by pleading guilty, and was fined but failing to pay the fine was sentenced to Hard Labor to pay the fine and costs.'

"Whereas the following questions arise:

"No. 1. Was the above a violation of the Revenue Laws?

"No. 2. What would be the proper Solicitor fee to charge?"

Answering your first request, my answer is in the negative. As I gather from your request, the defendant was not charged with practising of medicine without a license, but was charged with treating human beings without first obtaining a certificate of qualification from the State Board of Medical Examiners, and the offense is a misdemeanor.

As to your second request, I find that neither this section, nor any other law in this connection fixes the solicitor's fee for this offense, so we are forced to look to the general provisions of the law as to solicitor's fees. I call your attention to Section 3738, Code of Alabama, 1923, this section fixes solicitor's fees for prosecutions and in this connection I find the following:

"For each conviction of misdemeanor not otherwise provided for * * * ten dollars."

Therefore, the solicitor's fee in a case of this character is ten dollars.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 7, 1937

General John C. Coleman,
Adjutant General,
CAPITOL.

Travel expenses—Members of Military and Naval establishments—

Under Section 17 of the Military Code of 1936 (Acts, 1936, p. 109), members of Military and Naval establishments of the State may be reimbursed for **all** actual expenditures necessary in travel in obedience to orders.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The undersigned respectfully requests your ruling on Section 17 of the Military Code of Alabama, 1936, as to whether an officer traveling under military orders for the State of Alabama is entitled to actual expenses incurred while on duty to which ordered."

In my opinion, under Section 17 of the Military Code of Alabama, 1936, (Acts, 1936, p. 105 et seq.), members of the military and naval establishments of the State of Alabama, mentioned in said section, are entitled to reimbursement for traveling expenses while on military or naval business in obedience to the orders of the Governor, on the basis of **all** actual necessary expenses incurred in the performance of their duty.

The said Section 17 provides:

"Section 17. Expenses of officers and other persons while traveling under military orders to be paid.—Any officer or enlisted man of the National Guard or the Naval Militia of Alabama, or the United States Army, or the United States Navy, detailed for duty with the National Guard or Naval Militia of this State, traveling on military or naval business in obedience to orders of the Governor, may be paid all actual necessary expenses incurred in the performance of such duty. Vouchers and receipts for reimbursement for the expense hereby authorized shall be presented to the Adjutant General upon forms to be prescribed by him and warrants in payment thereof shall be drawn by the State Comptroller, upon the approval in writing of the said vouchers and receipts by the Adjutant General and by the Governor, in favor of such person for the amount of such expenses."

It is true that the so-called McGown Act (Acts, 1933, p. 81) provided that the maximum amount allowable to persons traveling in the service of the

State of Alabama or any of its agencies or institutions for expenses other than actual expenses of transportation should be $3.00 per diem. However, Section 17 of the Military Code is a later expression of the Legislature insofar as the same appertains to the members of military or naval establishments. It is in direct conflict with the McGown Act, and, ergo, it supersedes and repeals it insofar as members of the military and naval establishments are concerned.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 13, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

County Court of Walker County, Alabama—Compensation of Judge—Appointment and compensation of special Judge—

1. The Judge of the County Court of Walker County, Alabama, is not authorized to draw a warrant upon the county treasury of said county for his salary, in view of Section 5, Acts of 1935, page 803.

2. There is no authority for the appointment of a special Judge of the County Court of Walker County, Alabama; therefore, there is no authority for payment of compensation of such special Judge out of county funds.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of inquiry as follows:

"Under Local Law applying to Walker County, Local Acts 1927, page 381, a special County Court is provided and the salary of the Judge is fixed at $200.00 per month. The practice of this Judge is to draw a warrant on the County Treasurer on the first of each month for his salary, which is honored by the Treasurer. No claims for the salary is filed with the Board of Revenue and the warrant is not passed by them. The Judge of this Court claims he has this authority under Section 3802 of the Code of 1923.

"On September 3, 4, and 5th, 1934, the Judge of this Court was absent on account of the illness and death of his father. This fact being certified to the Clerk of the Circuit Court, Boliver B. Orear was appointed by him as special Judge to hold the regular session. The special Judge drew a warrant on the County Treasurer for $15.00 per day or $45.00 for his services, which was paid by the Treasurer. No claim was filed with Board of Revenue nor was warrant passed by them.

"1. Has the Judge of this Court under this local act or under the general law, authority to draw his own warrant, or must claim be filed and allowed by the Board of Revenue as other salaries?

"2. Is there any authority of law to appoint a special Judge of this Court and compensate him therefor out of county funds?

"3. If so, should not claim have been filed with Board of Revenue in regular manner?"

Answering your first inquiry, it is my opinion that the Judge of the County Court of Walker County has no authority to draw his own warrant on the county treasury for the amount of his monthly compensation. I am further of the opinion that there is no necessity that claim be made before the county governing body for the amount of the warrant every month, but that the same is payable as is provided by Section 5 of the County Financial Control Act (Acts, 1935, p. 803), which provides:

"Section 5. WHO SHALL ISSUE WARRANTS. No warrant shall be issued or check drawn on the County Treasury or County Depository by any person except the Judge of Probate or Chairman of the Board of Revenue, or like governing body, or such other officer as may be designated by such Board; and officers who are authorized to pay claims which have not been first approved by the Board, shall issue orders for warrants or checks which must be presented to the officer so authorized to issue warrants payable out of the County Treasury or County Depository."

The whole purpose and intent of the above cited provision of the County Financial Control Act, supra, was to centralize in one person the authority and power to draw warrants on the county treasury.

It was the evident intention of the Legislature, by the enactment of the County Financial Control Act, to establish a uniform system throughout the State, effective in counties within the population classification dealt with in said Act, viz., ninety-five thousand or under. Walker County is within this classification. To that end Section 19 of the said Act provides:

"Section 19. REPEALS CONFLICTING LAWS. All laws and parts of laws, except local acts applying to single counties, conflicting with any of the provisions of this Act be and they hereby are repealed."

This repealing clause specifically exempted from repeal the Budget Acts applying to certain counties, which had theretofore been provided by Local Acts.

Although the repealing provision, supra, excepts "local acts applying to single counties", it is my judgment that this exception from the repealing clause applies only to those local acts which established budget systems in the counties therein dealt with; and it was not intended by the Legislature that there should be exempted therefrom every provision of local law, authorizing some county official or employee to draw a warrant on the county treasury.

Of course, Section 4 of Local Acts, 1932, page 113, amending the prior local acts dealing with the County Court of Walker County, Alabama, among other things, provides:

"Section 4. That the judge of the County Court of Walker County, Alabama, after the approval of this Act, shall be paid a salary of $200.00 per month, to be paid as a preferred claim out of the general funds of Walker County, Alabama, upon warrant drawn by said judge upon the Treasury of Walker County."

Until the Budget and Financial Control Act of 1935 went into effect, Section 4 of the Local Act of 1932, supra, was effective to authorize the Judge of the County Court of Walker County to draw his own warrant upon the county treasury.

However, in my opinion, on the enactment of the said County Financial Control Act of 1935 and of Section 19 thereof repealing all laws in conflict, as I understand the terms so used, the authority and power was withdrawn from the Judge of County Court of Walker County to draw his own warrant upon the county treasury and that thereafter the warrant for his compensation should be drawn by the person designated by the county governing body, as provided in Section 5 of the County Financial Control Act.

The Local Act creating the County Court of Walker County, Alabama, and the amendments thereto (Local Acts of 1927, page 381, as amended by the Acts of 1931, page 196, as amended by the Local Acts of 1932, page 113) do not provide for the appointment of a special Judge. In the absence of a provision for such special Judge, I conclude that there is no authority for the appointment of such a special Judge nor for compensation for his services out of county funds.

It is my opinion, therefore, that your second inquiry should be answered in the negative.

Of course, litigants before the court may agree upon a member of the Bar thereof to act as special Judges in the trial of their cases in the event the regular Judge is absent or disqualified to act. But such special Judges cannot be compensated from public funds.

In view of the answer to your second inquiry, the necessity of an opinion upon your third inquiry is dispensed with.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 16, 1937

Hon. M. E. Marlett,
Clerk, Board of Revenue,
Lowndes County,
Hayneville, Alabama.

Schools—County is liable for necessary supplies furnished to custodian of county school funds.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of September 16, 1937, which is as follows:

"Please advise if Lowndes County Board of Revenue is supposed to pay for necessary supplies of stamps and stationery used by County Custodian of School Funds. Said Custodian receives a salary of $25.00 per month from the Board of Education."

The office of custodian of county school funds was created by Act No. 507, General Acts of 1935, p. 1090, which amends Section 94 of the School Code of 1927, which referred to the same officer as county treasurer of school funds.

As this Act makes no provision for the payment by the county of necessary supplies for the office, the general statutes must be considered. Section 169 of the School Code, 1927 provides in part as follows:

"* * * the County Board of Revenue or Court of County Commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms, and supplies required by the County Superintendent of Education and his assistants."

In my opinion, this section is broad enough to cover postage furnished the custodian of county school funds.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 16, 1937

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Sales Tax—Cotton seed meal used for fertilizer is not subject to sales tax.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of July 28, 1937, which is as follows:

"I wish to have your opinion on the following matter as early as possible due to the fact that our ginning season is near at hand:

" '1. Quite a lot of cottonseed meal is used as fertilizer and since fertilizer is exempt from the two percent Sales Tax please advise if cottonseed meal bought to be used as fertilizer is also exempt.

" '2. The custom has grown in the County and also in other counties over the State of swapping cottonseed at the gin for meal. The ginner takes the seed and swaps them to the oil mill for the meal and in turn swaps the meal to the farmer for his seed. Sometimes the swap is even. Sometimes they will give the farmer more than a ton of meal for a ton of seed and sometimes less, due I presume to the market price of cottonseed oil. Since cottonseed is exempt from the sales tax, please advise if the ginner will be permitted to make the exchange with the farmer without collecting a sales tax on the meal.' "

Act No. 126, General Acts 1936-37, page 125, generally known as the Sales Tax Act, provides the tax to which you refer. Section 4 (c), however, exempts from the provisions thereof the sale of quite a number of articles, among which are unprocessed cottonseed and fertilizer.

It is a matter of common knowledge that in Alabama cotton seed meal exchanged by the ginners for the farmers' cottonseed is used primarily for fertilizer. Therefore, it is my opinion that the sale of cotton seed meal is not subject to the sales tax. As Section 4 (c) specifically exempts unprocessed cotton seed, I am of the opinion that your inquiry should be answered in the affirmative.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 16, 1937

Hon. Chas. M. Hewitt,
Deputy Register,
Tenth Judicial Circuit of Alabama,
Birmingham, Alabama.

Registers—Under Code of Alabama, 1923, Section 6108.

Registers of the Circuit Court not authorized to charge for an office copy of record to the Supreme Court.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 30, 1937, requesting my opinion as follows:

"This is to acknowledge receipt of your opinion dated September 27, 1937, in answer to my inquiry requesting the proper charges of fees allowed Registers for the preparation of transcripts in cases appealed. One question, which involves a matter of some importance, seems to be not definitely answered, that is: In regard to the proper charge for the office copy of the transcript. Quoting from my original request dated June 2, 1937:

" 'May I invite your attention to the fact that Section 6108, providing for the office copy of transcripts and fixing the fee for same, refers only to Clerks of Court and not to Register. Due to this I would appreciate your opinion as to the proper charge, if any, for the office transcript in case of appeal.'

"You indicated, as is apparent, that Section 6108, does not expressly apply to Registers. You also stated in the opinion, that the last paragraph of Section 7283 applies to other additional copies than those for the appellee.

"The following questions are those presented to which I would appreciate your opinion:

"1. Since Section 6108 does not **expressly apply** to Registers, does it impliedly apply to Registers? ('Every other Section contained in Article 5, in which Section 6108 is found, seems to expressly apply to both Clerks of the Court and Registers.')

"2. If Section 6108 does not impliedly apply to Registers, is there any statutory authority to be found elsewhere for charges for the office copy of the transcript.

"3. If there be any authority, **express or implied,** for the charge of said copy, is the same two dollars and one-half, or is it at the rate of five cents per one hundred words?"

1. Your first question is whether Section 6108 applies by implication to registers of the circuit court as well as to clerks of the circuit court. In my opinion this question should be answered in the negative. It is well settled that the law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law. Code Section 7255.

Since Section 6108 affects fees and costs, it must be strictly construed and since this section does not expressly apply to registers, it cannot be extended by implication to apply to them.

2. In answer to your second question it is my opinion that there is no statutory authority authorizing or permitting the register of the circuit court to make a charge for an office copy of the transcript of the record for appeals to the Supreme Court.

There is no necessity for answering your third question.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 16, 1937

Hon. A. H. Arrington,
Attorney for the Board of Revenue,
Montgomery County,
Montgomery, Alabama.

1. Foreign corporation must qualify to do business in this State before qualifying as executor of the estate of a deceased person who had property in this State.

2. Property belonging to estate of a deceased person is not considered property employed by corporation in this State.

3. Corporation must pay entrance fee of $25.00 and permit fee of $5.00 to qualify to do business in this State. Franchise tax is based only on capital which might be employed in the State.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of October 15, 1937, which is as follows:

"If not asking too much I would greatly appreciate your giving me your opinion as to whether a national bank, being one of the executors of citizen of foreign state, would have to qualify under the laws of Alabama in order to legally convey real estate belonging to the estate of the deceased situated in Alabama.

"To state it more particularly, a resident of a foreign state died, leaving real and personal property—mainly real property—situated in this state. The deceased left a last will and testament appointing a national bank of two individuals as his executors, all residing in the foreign state. This will was regularly probated, in the state where testator lived and letters testamentary issued in that state.

"The will has been filed and probated in this state as an ancillary will under the statutes of this state.

"The executors desire to sell this property, consisting of all the property owned by the deceased, and the only necessity for the ancillary probate of the will in this state is to convey this property. The deed will be made in the foreign state, and will dispose of the entire property of the estate.

"The question is, will it be necessary for the national bank of the foreign state, one of the executors, to qualify to do business in Alabama in order to legally convey the property? In other words, would this transaction constitute 'doing business' in this state, requiring qualification in Alabama of the bank?"

In answer to your request I call your attention to an opinion rendered by Assistant Attorney General A. A. Evans, on April 17, 1926, to Hon. C. B. Smith, Member of the State Tax Commission, Biennial Report of the Attorney General, 1924 to 1926, page 332. It was held in that opinion as follows:

"In reply will say that in my opinion it is necessary for a foreign corporation to qualify to do business in this State before qualifying as an administrator of the estate of a deceased person situated in this State. As to the amount of the annual franchise tax which such foreign corporation must pay will say that in my opinion it must pay in proportion to the capital employed by it in this state. However, I do not consider property belonging to the estate of the deceased person as property employed by it in this State. Whatever capital other than that belonging to the estate which such foreign corporation is administering it is employing in this State will constitute the basis and measure of the annual franchise tax of such foreign corporation in this State."

In my judgment, the only expense that the corporation would incur would be the $25.00 entrance fee and $5.00 permit fee, there being no capital employed in this State by the said corporation on which a franchise tax can be computed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 18, 1937

Hon. Charles W. Lee,
State Comptroller,
CAPITOL.

Money collected as trial tax for each case that goes upon the docket of the Circuit Court should be remitted to the State and County Treasurers on the first day of each month.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 23, 1937, in which you request my opinion as follows:

"Under the present Revenue Code a Trial Tax of $3.00 is to be taxed in each case that goes on the docket in Circuit Court.

"The question arises as to when this Trial Tax is to be remitted to the State, that is to say, is it to be remitted monthly?

"When this Trial Tax is collected one-half of it is remitted to the County and Circuit Clerks are required by law to make remittances of monies collected for the County monthly, therefore, a report of this Trial Tax being made on a form which provides remittance to the County also provides remittance to the State and we can see no other conclusion to reach but that State Trial Tax remittance should be remitted monthly, however, an opinion from your office will clarify the situation and we will thank you to give us your ruling at an early date."

In answering your request, I call your attention to Section 9 of an Act to provide for the general revenue of the state, approved July 17, 1935, General Acts of 1935, page 256. This section is dealing with trial tax and its distribution, and says among other things as follows:

"Section 9. A trial tax of three dollars ($3.00) be, and the same is, hereby imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, **and when collected** to be paid by the clerk or register of such court as follows: * * *"

This section, strictly construed, means as collected, but we do not think the lawmakers intended that as soon as collected it should be transmitted to the state and county. If we should so hold, it would result in the clerk remitting almost every day to the state and county, but I think the Comptroller should require these remittances to be made on the first of each month. Section 303 of the 1935 Revenue Act, supra, I think, gives you the authority to make this requirement.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 18, 1937

Hon. J. B. Van Valkenburgh, Chairman,
Madison County Board of Commissioners,
Huntsville, Alabama.

Madison County Board of Commissioners have no authority to pay for supplies purchased by individual members without authority from the Commissioners Court, unless afterwards ratified by said Court.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of September 11, 1936, which is as follows:

"Enclosed find copy of minutes of the Board of Commissioners as of July 8th, 1936.

"Please render an opinion as to the legality of any bills incurred by a Commissioner in excess of his budget as set out in these minutes. Would said bills be legal claims against Madison County and would the Chairman be liable for damages in failing to accept and pay these claims?"

The minutes of a meeting of the Board of County Commissioners held on July 8th, 1936, which you mention in your letter disclose that a resolution was adopted limiting the expenditure of county funds for road maintenance and construction for the remainder of the calendar year 1936, to $30,000.00 This sum was apportioned among the five districts. The minutes of said meeting also show that a motion was carried providing that the county should not be liable for any debts or obligations contracted by a member of the Board in excess of the sum apportioned to that member's district. It was further provided that such member would be personally liable for any obligation so incurred.

I have carefully examined the Local Acts dealing with the Madison County Board of Commissioners and I am unable to find any provision of law authorizing an individual member of the Board to make purchases for the county so as to bind the county in the absence of a ratification of such purchase by the county governing body.

Courts of County Commissioners have no such authority under the general law.

I refer you to an opinion written on August 22, 1929, to the Probate Judge of Jackson County, (Biennial Report 1928-1930, p. 591) wherein it was held:

"Courts of County Commissioners have no authority to pay for supplies purchased by individuals without authority from the Commissioners Court, unless afterwards ratified by said Court."

In view of the above, I am constrained to the opinion that you cannot legally issue warrants for supplies, the purchase of which has not been authorized or ratified by the county governing body.—**Mobile County v. Maddox,** 195 Ala. 336.

I do not think that the budget adopted on July 8, 1936, can limit the expenditures in the event the majority of the governing body determine otherwise.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 19, 1937

Hon G. H Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

County is without authority to purchase piano for use of courthouse.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 20, 1937, in which you request my opinion as follows:

"Please advise us if Commissioners' Court can legally pay for a piano for the court house."

There is no authority of law for the county purchasing a piano for the use of the courthouse.

The policy long adopted in this State is that a county can incur no liability, make no contracts, nor do any act, regardless of the benefits that might be derived thereby, unless the power to do so is derived either from an express authorization of the law, or by necessary implication. It has no powers except those which are necessary to the performance of the governmental functions imposed on it. **Mobile v. Drago,** 172 Ala. 155; **Naftel v. Montgomery County,** 127 Ala. 562; Jack v. Moore, 66 Ala. 184; **Biennial Report of Attorney General,** 1918-20, p. 500.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 20, 1937

Hon. Guy Rice,
County Solicitor,
Autauga County,
Prattville, Alabama.

Local Acts of 1935, page 135, applicable to Autauga County, to be construed together with general statutes, particularly Section 303, sub-section 5, Code of Alabama of 1923. Passage of such Local Act does not effect priority of claims of State witnesses already registered and in line for payment.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 27, 1937, in which you request my opinion as follows:

"The 1935 Legislature passed an Act, Approved August 8th, 1935, (Local Acts 1935 Page 135) making certain warrants held by the County Solicitor a special charge against the fine and forfeiture fund of Autauga County, and directing the Custodian to Register said warrants

etc. Immediately upon the passage and approval of this Act these warrants were duly presented to the then Custodian and the same was registered and numbered from 1 on down in numerical order. As so registered several of these warrants were paid. Then later, but before all of said warrants were paid, the then Custodian erased this registration, and re-registered them giving said warrants a new number, and placing them at the end of all claims against the fine and forfeiture fund, and of course payment ceased to be made, as the new registration placed these warrants so far down the line that it will be years and years before they are reached for payment.

"There has been a change in the County Custodian, and his attention has been called to the facts as stated above, and we would thank you very much if you will kindly construe the Act above referred to, and advise if the County Custodian would be authorized under said Act to re-register the warrants which are still out standing and unpaid, and again restore them to the position of a special claim against the Fine and Forfeiture Fund of Autauga County."

The Local Act of 1935, page 135, referred to recites that you perform certain services as County Solicitor for which you received warrants payable from the Inferior Court Fund of Autauga County, which fund did not have sufficient moneys to pay the same. It was therefore enacted that said warrants "be and the same are hereby made a special charge against the general Fine and Forfeiture Fund of Autauga County, Alabama." It further provides that said warrants would be registered by the County Custodian against the Fine and Forfeiture Fund and paid in the order of their registration, and "the same shall be paid by said county custodian as fast as funds are received by him with which to pay said warrants until the entire amount of $880.00 shall have been paid."

Until the passage of this act, you, as County Solicitor, had no claim against the Fine and Forfeiture Fund of Autauga County. On the other hand, certain State witnesses had claims which had been registered and were in line for payment. It is, of course, well settled that all statutes should be construed so as to harmonize and avoid conflict, if possible. Section 303, sub-section 5 of the Code of 1923 provides as follows:

"5. To number and register, in the order in which they are presented, all claims against the fine and forfeiture fund which have been duly authenticated as claims against such fund, and without being audited and allowed by the court of county commissioners, such register showing the number of the claim, the date presented for registration, to whom payable, when it accrued, the character of the claim and the amount thereof; and to pay the registered claims of state witnesses in the order of their registration, and whenever there is a surplus of such fund, over and above the sum required to pay the registered claims of state witnesses, he must apply such surplus to the payment of the claims of officers of court in the order of their registration. All local laws in conflict herewith are hereby expressly repealed."

Under this section and under Section 4039, the fees of officers of the court are only paid from the surplus of the fund arising from the fines and forfeitures over and above the sum required to pay the registered claims of state witnesses. While the Local Act for your relief provides that your warrants are a special charge and shall be paid "as fast as funds are received", in my opinion the proper construction of this Local Act must be in harmony with the general law as cited above. It is, therefore, my opinion that the county custodian should register said warrants as of the time they

were presented to him for registration. Such warrants would not become a preferred claim payable prior to claims already registered nor would said warrants be payable except out of the surplus of funds over and above the amount of the claims of the State witnesses. It is therefore my opinion that if the register has registered said warrants in this manner the present county custodian has no authority to re-register said warrants so as to make them a prior and preferred claim out of the Fine and Forfeiture Fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 20, 1937

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Mobile County—County Treasurer of Mobile County not liable on his official bond for payments made by order of the Court as provided by Act No. 102 H. 259, approved April 10, 1936. (Local Acts 1936, Extra Session, page 61).

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date, enclosing a copy of petition filed in the Circuit Court and order of the Court authorizing an increase in the salaries of your clerical assistants. You request my opinion as follows:

"Would the County Treasurer of Mobile County be protected on his bond for the payment of the salaries authorized by this Court Order?"

In my opinion your question should be answered in the affirmative. I have carefully examined the petition and order of the Court and it is my opinion that they comply with Act No. 102, H. 259, approved April 10, 1936, Local Acts 1936, Extra Session, page 61, which provides in part as follows:

"Section 1. The Circuit Judges, or a majority of them, of Mobile County are hereby directed to authorize the Probate Judge, Tax Collector, Tax Assessor, Clerk and Register of the Circuit Court, of Mobile County to employ such clerks, in addition to those now provided for by law, as may be necessary to the proper functioning of each of said offices. Said Circuit Judges, or a majority of them, shall fix the number and salaries of all such clerks.

"Section 2. The salary of every such clerk appointed as hereinabove provided for shall be paid out of the general funds of Mobile County on warrants drawn by the head of the office or department where such clerk shall be employed."

Without passing on the constitutionality of the local act, I refer you to Section 2619 of the 1923, Code of Alabama, which provides as follows:

"2619. Officer paying and person receiving money paid under void law, not liable therefor.—When any state or county official shall have collected or paid out any money, as fees, salary or compensation for official services rendered under any law of Alabama, general or special, which law, subsequent to such collection or paying out, shall be declared by the supreme court of Alabama to be unconstitutional or void or illegal, such officer shall not be liable, either individually or on his official bond, in any suit brought for the recovery of such money, so collected or paid out, nor shall the person to whom the same shall have been paid, be liable therefor."

This office has previously upheld the constitutionality of this section. See Biennial Report of the Attorney General, 1930-1932, page 500.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 20, 1937

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—Mule dealer required to pay license for each place of business, even though such places are within one county.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of October 1, 1937, in which you request my opinion as follows:

"A mule dealer in this county has two barns in the same city, employs help at each barn and sells and trades horses and mules at each barn.

"Please advise us if this dealer must buy separate license for each barn."

Section 350(a) of the General Revenue Act of 1935 (1935 General Acts at page 558) provides:

"Whenever a license is levied in this act, there shall be collected both a state and county license for each place of business except as specifically otherwise provided."

The license about which you inquire make no exception. It reads as follows:

"Each person engaged in the business of buying, selling or exchanging HORSES, MULES, JACKS, JENNETS, shall pay a license tax of twenty dollars ($20.00) in each county, where such person engages in said business." Schedule 72 of the 1935 Revenue Act, page 245, Simon's Revenue Code.

As the Revenue Act, of which this section is part, specifically provides that each license levied shall be collected for each place of business unless otherwise provided, and as the schedule to which you refer does not make such exception, I am of the opinion that a license should be required for each place of business.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 21, 1937

Hon. J. R. White,
Chairman, Board of Revenue,
Walker County,
Jasper, Alabama.

Counties—Where valid debts outstanding as of October 1, 1935, were paid by advances from the General Fund rather than refunding warrants, refunding warrants may now be issued under the provisions of Act No. 379, H. B. 191, approved September 9, 1935 (General Acts, 1935, page 803) known as the County Financial Control Act.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of October 6, 1937, which is as follows:

"I would like to have your opinion as to whether or not Walker County may issue and sell interest bearing warrants under any provisions of the County Financial Control Act under the following circumstances and for the following purposes:

"On October 1, 1935, Walker County had outstanding warrants and claims in an amount totaling in excess of $18,000.00. It is my understanding that the county was entitled to issue refunding warrants to refund the outstanding warrant indebtedness and to issue funding warrants to pay the claims. The county intended to refinance this indebtedness but on account of delays in arranging for the refinancing of it decided to advance from its general fund a sufficient amount of money to take care of these items of indebtedness until such time as warrants could be issued to pay said debts. The amount advanced from the general fund for this purpose was taken from the current revenues of the county. It is now the desire of the Board of Revenue to issue and sell said warrants in order to replace said money with the general fund of the county.

"Please advise if the Board of Revenue of Walker County may issue warrants in the sum of $18,000.00 payable over a period not exceeding twenty years for the purpose of paying said warrants and claims which were outstanding on October 1, 1935, said payments to be made by returning the advance made from the general fund of the county for the purpose stated above."

I am of the opinion that your inquiry should be answered in the affirmative, provided that the money used to pay the outstanding claims as

of October 1, 1935, was actually advanced from the General Fund and not merely paid by the General Fund directly, and provided further that the claims in question were valid claims against the county.

Construing the provisions of Act No. 379, H. B. 191, approved September 9, 1935 (General Acts, 1935, page 803) known as the County Financial Control Act, this office has repeatedly held that valid claims outstanding as of October 1, 1935, may be refunded. It is also held that where a temporary loan was made to pay said claims that refunding warrants could nevertheless be issued to pay the temporary loan. These holdings were based on the theory that the obligation was merely changed in form and not extinguished. **Quarterly Report of the Attorney General,** Vol. II, page 138; **Quarterly Report of the Attorney General,** Vol. IV, page 12; **Quarterly Report of the Attorney General,** Vol. VI, page 151. Reasoning by analogy the same principle will apply to advances made from the General Fund which were used to pay said outstanding claims. Therefore, in my opinion, if the money was actually advanced from the General Fund to pay said outstanding claims and said claims were not merely paid from the General Fund directly, refunding warrants may now be issued to replace the monies advanced from the General Fund.

This opinion is distingushed from the opinion rendered to you on March 16, 1937 (Quarterly Report of the Attorney General, Volume VI, page 151, supra) in that, under the present facts the money was advanced from the General Fund, whereas, under the facts in said former opinion the obligations were paid directly from the General Fund, thereby extinguishing the debt and not merely changing its form as in the instant case.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 22, 1937

Hon. O. L. Bethune,
Tax Assessor,
DeKalb County,
Fort Payne, Alabama

Taxation—Homestead Exemption—Act 107, General Acts of 1936-37, p. 113.

Homestead exemption from 1936-37 State taxes may be asserted and credit given therefor after October 1, 1937, and before tax collector invokes machinery of the State to enforce tax collections.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry as follows:

"Are we to issue Homestead Exemption to home owners to apply on 1937 taxes after the tax year expires which is October 1, 1937?"

It is my opinion that a taxpayer may assert his homestead exemption from 1936-37 State taxes and receive credit therefor after October 1, 1937,

and before the tax collector invokes the machinery of the State to enforce ad valorem tax collections.

In an opinion of this office to Hon. Madison L. Smith, Tax Assessor, Washington County, Chatom, Alabama, dated October 5, 1937, I held that Act No. 107, General Acts of 1936-37, p. 113, granting Homestead exemptions, is not self-executing, and that the taxpayer is required to assert his claim for a homestead exemption. No mention was made in this opinion, because the question was not asked, as to when the taxpayer would be barred from asserting a claim of homestead exemption from payment of taxes due the State for the tax year 1936-1937.

The reasoning set forth in the opinion to Mr. Smith is pertinent to this opinion. In addition to the inference to be drawn from the Homestead Act that the Legislature intended for the taxpayer to perform an assertive act in pursuit of the gratuity offered in the form of a homestead exemption from the payment of State taxes, I think also that an inference may be drawn that the legislature intended for the assertive act to be executed within a reasonable time. Certainly, the legislature did not intend for the taxpayer to have an indefinite time within which to assert his claim for a homestead exemption from the payment of state taxes for the year 1936-1937.

What shall constitute a reasonable time within the intent of the legislature is a question of prime importance to the State of Alabama and to the taxpayer. The same legislature that enacted the Homestead Exemption Act also adopted or passed a General Revenue Act and fixed therein a time limit for the payment of ad valorem taxes. It may be reasonably presumed that the legislature intended to give the taxpayer a reasonable time within which to pay his taxes without the addition of expense for foreclosure thereof. It is my opinion that one may reasonably look to the time limit prescribed by the legislature for the payment of taxes without additional expenses being attached thereto, as a criterion for the assertion of a claim to homestead exemption. I think a logical inference may be drawn from such time limit that the legislature intended such time as reasonable for the assertion of a homestead claim. Therefore, I conclude that it was the intention of the legislature that the taxpayer, to avoid a forfeiture, may assert his homestead exemption from the payment of 1936-37 taxes after October 1, 1937, but not after the tax collector has invoked the machinery of the state to collect the ad valorem taxes for such year. This opinion is limited to homestead exemption from payment of state taxes for the tax year 1936-37.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 22, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Under the law it is the duty of the State Comptroller to satisfy and pay in full, or as nearly so as possible, all lawful appropriations before accumulating any cash balance in the State Treasury; the Comptroller is without authority to carry forward from one

fiscal year to another any cash balance in the State Treasury, leaving outstanding and unpaid lawful appropriations, whether such appropriations, are for non-essential or essential function of government.

Opinion by the Attorney General.

Dear Sir:

Your letter of October 22, in which you propound three questions, has been received. I repeat here your letter:

"Under the law, is the State Comptroller authorized to set aside, set up, or accumulate in the General Fund of the State Treasury, as a balance, or as a cash balance, any amount of money before or until all appropriations made by the Legislature have been paid in full?

"Under the law, is the State Comptroller authorized, under the provisions of the so-called Budget Act Amendment to the Constitution, and the Statutes passed in connection therewith, to set up or accumulate in the State Treasury, and to carry forward such accumulation into the next succeeding fiscal year, any cash balance or accumulation of money in the General Fund of the State Treasury, before or until all lawful appropriations have been paid in full during such preceding fiscal year?

"Under the provisions of Amendment 26 to the Constitution of Alabama, generally referred to as the Financial Control Amendment, and the Statutes enacted pursuant thereto, can the State Comptroller legally carry a so-called cash balance in the General Fund over from one fiscal year into another when there are unpaid appropriations payable from the General Fund?"

Since the three questions propounded in your request relate to the same general subject, I shall not answer the questions disconnectedly, but will answer the three questions by one answer.

Your letter deals with the question of the right of the State Comptroller to accumulate a cash balance in the General Fund of the State Treasury without first paying all lawful appropriations. In other words, you desire to know whether the State Comptroller may lawfully accumulate a balance and at the same time allow a certain percentage of all appropriations to go unpaid. Your letter also inquires whether any cash balance accumulated during any given fiscal year may be carried forward to the succeeding fiscal year, without paying all the appropriations, or as much thereof as may be paid, during such given fiscal year. In other words, based on the questions you ask, the following state of facts may be reasonably assumed: At the end of the 1936-37 fiscal year, let us say, there was a balance in the State Treasury of several hundred thousand dollars. Let us assume that the formula in the Budget Act was applied to appropriations and revenue without taking into consideration this cash balance, and that the factor to be applied to the payment of appropriations for non-essential functions of government were paid on a basis of something less than 100 per cent of such appropriations. Would the Comptroller, under these circumstances, be authorized, in law, to carry forward this cash balance of several hundred thousand dollars to the next succeeding fiscal year instead of using such cash balance, or whatever part of the same may be necessary, in paying all or a substantial part of the lawful appropriations made by the Legislature for the fiscal year 1936-37.

Your questions call for a brief discussion of Article 23 of the State Constitution, and the statutes passed in connection therewith, commonly referred to as the Budget and Financial Control Amendment and Acts. This amendment and the statutes enacted pursuant to such amendment, do not contemplate the application of the formula unless the revenue is insufficient to pay all appropriations. The proration mentioned in the Budget Amendment and in the statutes has a field of operation only in those cases where there is not a sufficient amount of revenue to pay the appropriations. If there is a sufficient amount of revenue to pay appropriations made for carrying on both essential and non-essential functions of government, then neither the constitutional amendment nor the statutes passed pursuant thereto, provide for any proration or distribution of the available revenue. I beg to invite your careful attention to the wording of both the amendment and the statutes, wherein you will find this idea expressed very clearly.

The budget laws were intended to have a field of operation only in a situation where the revenue is not sufficient to meet the lawful appropriations. If there is a sufficient amount of revenue in any given fiscal year to pay all appropriations, including appropriations for essential and non-essential functions of government, then it is the clear duty of the Comptroller to pay in full all lawful appropriations. A cash balance in the General Fund does not go hand in hand with unpaid appropriations. The Legislature has enacted certain appropriation bills and has provided revenue to meet those appropriations. The Legislature intends that the appropriations shall be paid if the revenue is available for the payment of such appropriations. If the revenue for the payment of such appropriations is not sufficient to pay such appropriations, then the law directs that the essential functions of government shall be paid for first and that if there is not a sufficient amount of revenue to pay in full the appropriations for non-essential functions of government, then and in that event the formula set forth in the law shall be applied and such appropriations for non-essentials shall be fully satisfied and paid by application of the formula mentioned in the Budget Act, in this: The Comptroller must issue warrants for that proportion of each of such claims which the money available for the payment of all said claims bears to the whole, and such warrants for such prorated sums shall thereupon be paid by the State Treasurer in full satisfaction of such appropriations.

It will be noted that the statutes passed pursuant to the Financial Control Amendment provided for the lapsing of appropriations, but this merely means that all unencumbered balances of administration, operating and maintenance appropriations shall revert back to the State Treasury at the end of each fiscal year, to the credit of the General Fund, or special funds, as the case may be.

The Legislature has clearly recognized the principle mentioned above, not only in the Budget Amendment and in the statutes passed pursuant thereto, but also in an act found on page 142 of the General and Local Acts of Alabama, Extra Session 1936-37, wherein the Legislature provides a property tax relief fund only if a surplus of $750,000 has accumulated and only after all State appropriations payable from the General Fund have been paid in full.

So, it is my judgment that the Comptroller would be violating the letter and spirit of the law if he should accumulate a cash balance in the Treasury and at the same time refuse to pay all lawful appropriations. It is my further judgment that the Comptroller would be violating the letter and the spirit of the law to carry over from any given fiscal year

to the next succeeding fiscal year any cash balance without first satisfying in full, or as nearly as possible, all outstanding and unpaid lawful appropriations, whether such appropriations are for essential or non-essential functions of government.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 25, 1937

Hon. Henry S. Long,
State Tax Commission,
Montgomery, Alabama.

Mileage Tax—State lien for unpaid mileage tax due by operator of motor vehicle is superior to the lien of the purchase money mortgage on the vehicle, even though such mortgage was properly executed and recorded at the time of the purchase.

Opinion by Assistant Attorney General Thomas.

Dear Sir:

I wish to acknowledge receipt of your letter of August 27, 1937, as follows:

"We have a truck attached for Mileage Tax of an operator which tax is past due and delinquent.

"The International Harvester Company sets up a claim of $450.00 due them on this truck. Claim of International Harvester Company is for balance due them on purchase price of this truck as shown by mortgage properly executed and recorded."

I am of the opinion that the State's claim for past due mileage tax is superior to the purchase money mortgage.

Under the provisions of Schedule 158.21 of the 1935 Revenue Act, the "Alabama Motor Carrier Act of 1931" approved June 19, 1931, was re-enacted. Said Act of 1931, page 309, reads as follows:

"The State shall have a lien upon all of the property in this State of any motor transportation company for the payment of the mileage tax provided by this Act and the fees and penalties of this section, provided for, **which lien shall be superior to all other liens, except a lien for State, County and Municipal Taxes.**"

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 26, 1937

Hon. Cecil Deason, Solicitor,
Jefferson County Court of Felonies
and Misdemeanors,
Birmingham, Alabama.

1. Jefferson County Civil Service Act (General Acts 1935, page 691) applicable to employees of Jefferson County Court of Felonies and Misdemeanors.

2. Solicitor and Clerk of Jefferson County Court of Felonies and Misdemeanors held not employees and not subject to provisions of Jefferson County Civil Service Act.

Opinion by the Attorney General.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"House Bill 737 on Page 691, the General Acts of Alabama 1935 Regular Session, which sets up Civil Service in counties having a population of two hundred thousand or more which was approved on August 28, 1935. As you know this bill only applies to Jefferson County at this time. On page 228 in the Local Acts, Regular Session, 1935, Legislature appears House Bill 725, which was approved on September 7, 1935, and refers to the operation of the Jefferson County Court of Misdemeanors and Felonies.

"QUESTION: Whether or not the employees of the Jefferson County Court of Misdemeanors under House Bill 725 are under the Civil Service Board in this county."

It is my opinion that the Jefferson County Civil Service Act, **General Acts 1935,** page 691, is applicable to employees of the Jefferson County Court of Felonies and Misdemeanors.

Section 2 of the Act specifically provides:

"There is hereby created and established in and for each separate county of the State of Alabama which has a population of 200,000 or more people——a Personnel Board for the government and control, by civil service rules and regulations and practices hereinafter set out or authorized, of **all employee and appointees** of such counties and the municipalities therein, **and of each and every appointing authority therein,** and such Board is now given and vested with such power, authority and jurisdiction."

In Section 16 of the Civil Service Act it is also provided:

Whenever the appointment or employment of new or additional officers or employees of such counties, municipalities or appointing authorities, therein, is hereafter authorized by law, such officers or employees shall be subject to the provisions hereof and included within the county and municipal service, unless of a class excepted herein."

I think the provisions to which I have referred are sufficient to show a legislative intention to make the civil service law include and embrace all employees and appointees of a county, except those that are expressly excepted from its operation and effect by Section 2 of the Act.

I do not find anything in the Local Act approved September 7, 1935, Local Acts 1935, page 228, that has the effect of taking the employees of the Jefferson County Court of Felonies and Misdemeanors out from under the provisions of the Civil Service Act. It is true that Section 9 of said Local Act authorizes the Judge of the Court to appoint a Clerk for said Court, and in Section 11 of the Act the Judge is authorized to appoint as many clerks and deputies as may be needful or necessary for the proper conduct of the affairs of said office, and in Section 18 the Judge is authorized to appoint the solicitor of said Court. In Section 2 of said Local Act it is specifically provided that all laws or parts of laws in conflict with the provisions of this Act are repealed.

In my judgment the two Acts should be construed in pari materia. I do not see any real conflict between a provision that provides that the Judge may appoint as many clerks as may be needful and a provision that all clerks appointed must be appointed from an eligible list furnished by the Civil Service Commission. In other words, it is my opinion that a fair construction of the statute would be that in substance and effect it is now provided that the Judge of the Court may appoint the employees, but he must appoint them from an eligible list furnished by the Civil Service Commission. That would give each statute a field of operation, and seems to be consistent with the clear legislative intent to experiment with civil service in Jefferson County. **Tucker v. McClendon,** 210 Ala. 562.

No rational reason appears for placing all other county employees under civil service and taking the employees of the Court of Felonies and Misdemeanors without the operation and effect of the civil service act. In view of the very broad and comprehensive language employed by the Legislature in Section 2 of the Civil Service Act, it seems to me that some sound reason would have to be advanced for taking the employees of the Court of Felonies and Misdemeanors without the Civil Service Act before it could be reasonably said that that was the effect of the Local Act of 1935.

In what I have said I would not want to be understood as intimating that it is my opinion that the clerk and solicitor of the Court are employees or appointees of the County and therefore under the Civil Service Act. I entertain a contrary opinion. It is my opinion that the Clerk of the Court is a public officer and not an employee or an appointee, as those terms are used in the Civil Service Act. I am also of the opinion the Solicitor of the Court is a public officer and not an employee or appointee, within the language of the Civil Service Act. There is a marked distinction between an employee and an officer that the courts have always been careful to observe. You may consult with profit the following authorities on this point:

State v. Wilkinson, 220 Ala. 38

State v. Wilkinson, 220 Ala. 172

Ward v. State, 203 Ala. 306

State v. Hawkins, 53 A. L. R. 583

State v. Hutchinson, 105 A. L. R. 1234

State v. Futch, 165 So. 907.

In the cases cited you will find the distinction between office and employment thoroughly discussed.

It is inconceivable to me that the Clerk of a Court of Felonies and Misdemeanors can be regarded as anything but a public officer. It is likewise

inconceivable to me that a Solicitor can be regarded otherwise than as a public officer. The fact that the law making power may have declared the position an office or employment is not conclusive. Groves v. Barden, 84 S. E. 1042, Ann. Cas. 1917D 316.

An officer is obligated to perform the duties required of him by law; an employee does what he is told to do. If the incumbent is invested with some of the functions pertinent to sovereignty, it is generally held that he is a public officer. **22 H. C. L.**, page 374, par. 4.

It is not necessary for me to here enumerate the numerous acts that the Clerk and Solicitor are called on to perform which requires the exercises of some of the functions pertinent to sovereignty.

The Legislature intended the Civil Service Act to apply to employees and not to officers. In **Flaberty v. Millican,** 86 N. E. 578, the court held that a deputy sheriff is not affected by the civil service law. In **Grifenhagon v. Ordway,** 113 N. E. 516, the court held that a jury clerk was without the operation of the civil service law. In **In Re Janitor of the Supreme Court,** 35 Wis. 14, that court had considerable to say about the inherent power in every court to appoint its assistants. These cases may throw some light on the question under discussion.

I am therefore of the opinion that the Jefferson County Civil Service Act is applicable to the employees of the Jefferson County Court of Felonies and Misdemeanors, but that the Solicitor and Clerk of said Court are not employees and are not subject to the provisions of that Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 27, 1937

Hon. J. F. Laseter, Judge of Probate,
Barbour County,
Clayton, Alabama.

War Veterans—Exemptions from license tax a disabled War Veteran is not exempted from paying license under the Alabama Beverage Control Act relative to the sale of Beer, Wine, and Liquor.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of August 23, 1937, in which you state:

"Please give me your opinion on the following: Is a World War Veteran that has 25 per cent disability exempt on any part of license under the Alabama Beverage Control Act relative to the sale of Beer, Wine, and Liquor. Please give me your opinion as early as convenient."

I am of the opinion that a War Veteran, regardless of disability rating, would not be entitled to any exemptions from the payment of license to sell beer, wine, or liquor under the Alabama Beverage Control Act (General Acts 1936-1937, Extra Session, page 40). This act sets out therein the exemptions allowed. Section 2, paragraph "g", at page 41, reads as follows:

" 'Alcohol', means ethyl alcohol produced by the distillation of any fermented liquid, whether rectified or diluted, with or without water, whatever may be the origin thereof, and includes synthetic ethyl alcohol. It does not mean ethyl alcohol, whether or not diluted, that has been denatured, or otherwise rendered unfit for beverage purposes.

"The provisions of this act shall not apply to ethyl alcohol intended for use and/or used for the following purposes:

1. For scientific, chemical, mechanical, industrial, medicinal and culinary purposes.

"2. For use by those authorized to procure the same tax-free, as provided by the Acts of Congress and regulations promulgated thereunder.

"3. In the manufacture of denatured alcohol produced and used as provided by the Acts of Congress and regulations promulgated thereunder.

"4. In the manufacture of patented, patent, proprietary, medicinal, pharmaceutical, antiseptic, toilet, scientific, chemical, mechanical and industrial preparations or products, unfit for beverage purposes.

"5. In the manufacture of flavoring extracts and syrups, unfit for beverage purposes."

And also Section 58, page 84, as follows:

"Regularly licensed physicians, dentists, and/or any person holding a license to practice medicine, or to engage in any profession wherein the treatment of the human body and/or of an animal body is necessarily involved, clinics, non-commercial laboratories, hospitals and/or sanatoria may acquire, own and dispense for medicinal, mechanical or scientific purposes only, and not for beverage purposes, any alcoholic beverage, and/or ethyl alcohol; also any minister, pastor or officer of a regularly organized, religious congregation or church, and any other person who, under the ritual of any recognized religious denomination is authorized or required to use wine for sacramental purposes in the ceremonies or ritual of such religious denomination."

You will note that nowhere therein are Veterans mentioned as exempted from the payment of a license, and further, to dispell all doubt on the question the legislature set out this positive language in Section 60, at page 85.

"The exemptions from alcoholic beverage tax enumerated and defined herein, granted in the foregoing Act are hereby declared to be exclusive and any laws or parts of laws, general, special or local, granting or attempting to grant any exemptions from alcoholic beverage tax, except as provided in this Act, are hereby specifically repealed."

The excluding provisions of this Act, having been enacted into law subsequent to an Act approved September 13, 1935, (General Acts 1935, page 1057) providing certain exemptions to disabled War Veterans, will prevail.

Therefore, from the foregoing it can be seen that exemptions under the Alabama Alcoholic Beverage Control Act cannot be extended to include disabled War Veterans.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 27, 1937

Hon. E. T. Carpenter,
Clerk of the Circuit Court,
Washington County,
Chatom, Alabama.

Attention Mr. Carpenter—

Circuit Clerks entitled to fee of $.15 per one hundred words, for record for the Supreme Court, in a case where the defendant is convicted in the Circuit Court and appeals to the Supreme Court of Alabama, such fee to be collected, in case of defendant being ultimately acquitted, from the fine and forfeiture fund of the county; provided, however, that fees of state witnesses shall have priority over such fee of Circuit Clerk. Sections 3739 and 3740 of the Code of Alabama, 1923 and General Acts of Alabama, Regular Session 1931 (H. 673) p. 331.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of October 14, 1937, requesting my opinion as follows:

"We have a case that was tried in Circuit Court and the defendant found guilty. The defendant appealed his case to Supreme Court and the Supreme Court reversed the case. The second time that the defendant was tried he was found not guilty has the Clerk any authority to collect for making the transcript to Supreme Court. Please advise in what way the Clerk can collect for making the transcript to Supreme Court."

Answering the inquiry, contained in your letter above set out, the Circuit Clerk does, in my opinion, have authority, in a criminal case, to collect for making a transcript to the Supreme Court on appeal.

Section 3739 of the Code of Alabama 1923, as the same is amended by House Bill 673, General Acts of Alabama, Regular Session, 1931, provides the services for which Circuit Clerks are entitled to fees in criminal cases, and the amount of such respective fees; and, among other things, it is provided, as follows:

"Record for Supreme Court, for each 100 words—$.15."

Section 3740 of the Code of Alabama, 1923, providing for the taxing and collecting of such fees, provides among other things, as follows:

"and in all trials in the Circuit Courts, or County Courts, where the state fails to convict, or the indictment abates, or is nol prossed, or withdrawn, the fees of the Sheriffs and Clerks of the Courts shall be paid out of the fine and forfeiture fund; but the Sheriffs and Clerks must make affidavit before the Circuit, or Probate Judge of the amount due them; and the right of the Sheriffs and Clerks to such payment of their fees shall be postponed to the rights of State Witnesses, as they now exist."

In view of the law governing fees to which Clerks of the Circuit Courts are entitled, and the manner of taxing and collecting the same, as above quoted, I am of the opinion that, under the circumstances set out in your letter, the Clerk of the Circuit Court would be entitled to a fee for making a transcript of record on appeal to the Supreme Court, the amount of the same to be determined on a basis of $.15 per 100 words; and that, also, the

said Clerk would be entitled to have the same paid out of the County fine and forfeiture fund, provided, however, that he would not be entitled to such payment from said fund so long as any State Witness fees remained outstanding and unpaid against the same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 28, 1937

Hon. L. E. Hall,
Circuit Clerk,
Pike County,
Troy, Alabama.

1. Costs and fees—Defendant who pleads guilty and is sentenced between terms of Court should be taxed with fees and estimated mileage of "witnesses subpoenaed on the part of the State."

2. Section 7235, Code of Alabama, 1923, requiring witnesses to prove attendance within five days, is applicable to civil and criminal cases.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your letter of recent date, which reads as follows:

"I shall appreciate it very much if you will advise me as to my duty and liability as to fees of witnesses in criminal cases before the County Court, where, after witnesses are subpoenaed for the State, duly served, the Judge allows the defendant to interpose a plea of guilty between terms of Court, assesses a fine, and the defendant then and there wishes to pay the fine and costs, or to begin serving his sentence. I cannot include as part of the costs the fee and mileage of the witness, as I have no means of knowing the mileage, nor can I know whether the witness will attend court. If the charges are not included in the costs, and the defendant pays the costs, or is sentenced for costs and when court meets, the witness appears, is he not entitled to prove up, and is it not my duty to issue a certificate to such witness for his per diem and mileage? Of course, I know if the witness could be notified not to attend, and his subpoena recovered, there would be no charges, but I am assuming that the witness is not notified and that he appears at the next regular term of court, as you know, County Court meets on the first Monday in each month. But quite frequently, between terms, defendants desire to plead guilty and pay the fine and costs, or to begin serving their time. If you answer that such witnesses are entitled to prove up and get certificates, then would I not be liable for their fees and mileage if such charges are not included in the costs? In that event, would it not necessarily follow that no defendent could plead guilty and pay his fine and costs where witnesses have been subpoenaed for the State, in advance of the next term of court, unless the subpoenas are recovered and returned to the clerk?

"Please advise also whether the provisions of Section 7235 of the civil code apply to criminal cases."

It is my opinion that such a procedure as you mention was never contemplated by the lawmakers, for, as far as I can find, there is no statute setting out the method whereby a defendant may plead guilty and be sentenced between terms of court. I might suggest that if the judge would allow the defendant to plead guilty between terms of court but not sentence him until the day set for trial, he would obviate a great deal of confusion.

If, however, a defendant is allowed to plead guilty between terms of court and is also sentenced at that time, I am of the opinion that the clerk should include in the cost bill the fees and estimated mileage of all witnesses "subpoenaed on the part of the state." Section 3763, Code of Alabama, 1923 provides in part as follows:

> "3763. The fees of witnesses, **subpoenaed on the part of the state** to appear before . . . . any court in which a criminal prosecution is pending, must be taxed against the defendant if he is convicted. . . ."

If the witnesses appear, they unquestionably are entitled to their fees and mileage. **Section 3762, Code of 1923** as amended by **Act No. 105,** General Acts 1932, p. 102. If the witnesses do not appear, however, I am of the opinion that the defendant should receive a credit of their fees and mileage.

In answer to your second inquiry, I refer you to Biennial Report of Attorney General 1920-32, p. 613 wherein it is held by this office that Section 7235, Code of Alabama 1923 applies both to civil and criminal cases.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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October 28, 1937

Hon. Harvey J. Bodiford,
Superintendent of Education,
Henry County,
Abbeville, Alabama.

1. Alabama School Code of 1927—Board of School Trustees may refuse to accept assignment of teacher within ten days from the date of notice of teacher's assignment.

2. Reasons stated in refusal to accept assignment need not be given in detail.

3. Teacher accepting employment after refusal of assignment by Board of School Trustees held not entitled to recover pay therefor.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of October 14, 1937, in which you request my opinion as follows:

> "On July 15, 1937, I assigned a teacher to teach in the Newville Elementary School. This teacher was elected by the County Board of Education on September 7, 1937. Contract was issued to her on September 7 effective September 20. On September 13, I received a notice copy of which I attach.

"I will appreciate your giving me an opinion on the two following points:

"(1) Is this objection valid in view of the fact that it comes over 10 days after assignment? (See Section 180 of the School Code of 1927, referred to in opinion to Hon. C. J. Allen dated September 23, 1937).

"(2) If the objection is in time, is the statement in this notice a sufficient 'reason' to justify the discharge of this teacher under Section 180, supra.

"It seems to me that the discharge of this teacher would be an unjust hardship, as she has been under the impression that she was to have this school.

"She has been teaching since September 20, and if you rule that she is not properly holding this position, I will appreciate your advising if she should be paid for services already rendered."

Section 180 of the School Code of 1927 provides that the Trustees may refuse to accept the assignment of a teacher by giving written notice within ten days "from the date of the superintendent's notice of assignment." You do not advise me in your letter of the date upon which you notified the Trustees of the Newville Elementary School of this teacher's assignment. However, it appears from the copy of the objection attached to your letter that such notice of the assignment of said teacher was within ten days of the objection. I am therefore of the opinion that the objection is valid as it is within ten days of the assignment of said teacher.

2. The objection states, "You are hereby notified that the reason for said refusal is that it is the opinion of said Trustees, and each of them, that it would not be for the best interest and concern of the Newville Grammar School for said teacher to teach in said school." While this "reason" is more or less the conclusion, in my opinion, it is sufficient under the requirements of Section 180 of the School Code of 1927. In the case of **Gibson v. Mabry,** 40 So. 290, 145 Ala. 112, it was held that where a County School Board was vested with a certain discretion, the reasons of such Board should not be inquired into. By analogy, the various facts which cause the Board of School Trustees to come to the conclusion that it would not be the best interest of the school for said teacher to be assigned thereto, should not be inquired into, and, in my opinion, the objection sets out a sufficient reason for the refusal of said teacher.

You also inquire as to whether or not the teacher should be paid for services already rendered. In the case of **County Board of Education v. Watts,** 95 So. 498, Cert Den. 95 So. 502, it was held that a school teacher could not recover compensation without a contract, either express or implied. It was further held that no contract could be implied from acts of the Board beyond the scope of authority granted them by the statutes. It was further held that such a school teacher or school principal accepting a contract, was charged with knowledge of the limitation of authority upon the Board. It is, therefore, my opinion that said teacher is charged with knowledge of the limitation upon the authority of the County Board of Education to contract with her, that is, that such contract was subject to the right of the school Trustees to refuse the assignment. She is also charged with notice of the records of the County Board of Education of the refusal of such Board of Trustees to accept her assignment. In my opinion, therefore, she is not entitled to recover for services rendered with knowledge of the refusal of the Trustees to accept her assignment.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 28, 1937

Hon. H. A. Terry,
Judge of Probate,
Hale County,
Greensboro, Alabama.

1. An appearance bond in a criminal case on forfeiture makes the principal and sureties liable only for not exceeding the amount of the bond and the costs of the forfeiture.

2. The minutes of the county court are legal if made on a printed form, that is, partly printed and partly written.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 10, 1937, in which you request my opinion as follows:

"I should appreciate it very much if you would give me an opinion on the following case:

"How much of the accured cost can the sureties on a bond be held liable for when a bond forfeiture is made final? Are the sureties held liable for the total court cost plus the amount the forfeiture is made final for?

"I should also like to know if minutes of County Court will be legal if kept on a printed form so that only pleadings and sentences will have to be written in."

Answering your first inquiry, the sureties upon an appearance bond in a criminal case can only be made liable in case of forfeiture for the amount of the bond and the costs of the forfeiture. You will note an appearance bond only guarantees the appearance of the defendant in court on the date the case is set for trial, and from term to term until discharged by law. I call your attention to Section 3382, Code of Alabama 1923, which is as follows:

"Section 3382. Effect of undertaking; to what extent binds parties thereto.—The undertaking of bail binds the parties thereto, jointly and severally, for the appearance of the defendant on the day fixed in the bond or undertaking, from day to day of such session, and from day to day of each session thereafter, until he is discharged by law; and, if the trial is removed to another county, for the appearance of the defendant from day to day of each session of the court to which it is removed until discharged by law."

**Peck v. State,** 63 Ala. 201, 2nd Enc. Dig. 149; **State v. Crosby, 114** Ala. 11, (22 So. 110).

My answer to your second inquiry is in the affirmative. I call your attention to Section 1, Code of Alabama 1928, (Michie), which is in part as follows:

"Section 1. Signification of words.—Words used in this * * * the word "writing" includes typewriting and printing on paper; * * *."

**Carter v. Tennessee Coal, Iron & Ry. Co.,** 61 So. 65.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 29, 1937

Hon. Cyrus B. Brown,
Chairman, Board of Revenue,
Montgomery, County,
Montgomery, Alabama.

1. Under the provisions of Act No. 468, approved July 22, 1931, General Acts, 1931, page 550, the twelve hundred dollars provided by Section 2 thereof to be paid to the representative of the State Tax Commission having charge of equalization and adjustment of taxes remains in the Contingent Fund provided for in said Act, if there is no representative of the State Tax Commission to whom the money is paid.

2. Under the terms of Act No. 468, approved July 22, 1931, General Acts, 1931, page 550, the Board of Revenue is authorized to expend not exceeding the sum of seven thousand dollars per annum out of any moneys in the county treasury not otherwise appropriated for any county purposes not otherwise provided for by law.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of October 27, 1937, which is as follows:

"By a recent order of the Governor, the State Tax Commission abolished the office of Tax Agent in Montgomery County and all other counties of Alabama, as of October 1st., 1937.

"General Acts, 1931 Regular Session, at page 550, Senate Bill 369 authorizes and empowers Boards of Revenue of Counties of a population not less than 75,000 nor more than 100,000 persons in Section 1 of this act '—to appropriate out of any moneys in the county treasury not otherwise appropriated and to expend not exceeding the sum of $7,000.00 per annum for any county purposes not otherwise provided for by law that in their judgment are worthy and for the interest of the county, the fund hereby authorized to be created to be known as the "Contingent Fund".'

"Section 2 of this Act reads as follows; 'That $1,200.00 of the fund herein appropriated per annum shall be paid over to the representative of the State Tax Commission having charge of the equalization and adjustment of taxes on property situated in such counties, for ex officio services and expenses of maintaining his office in said county. Said $1,200.00 per annum to be paid over to the said representative of the State Tax Commission in monthly installments and disbursed by him.'

"At the present time there is no representative of the State Tax Commission having charge of the equalization and adjustment of taxes in Montgomery County.

"I would like to be advised on the following questions:

"(1) When there is no representative of the State Tax Commission charged with the equalization and adjustment of taxes in this county does the $1,200.00 provided for him in Sec. 2 remain in the Contingent Fund provided by the Act?

"(2) Does the Board of Revenue of Montgomery County have the authority to engage and hire help in the Tax Assessor's office in addition to that specifically provided for, when in the opinion of the Board it is to the best interest of the County that such help be retained and to pay such help out of the Contingent Fund set out in said Act?"

Section 1 of Act No. 468, approved July 22, 1931, General Acts, 1931, page 550, authorizes Boards of Revenue in counties with a population classification of Montgomery to "appropriate out of any moneys in the county treasury not otherwise appropriated and to expend not exceeding the sum of $7,000.00 per annum for any county purposes not otherwise provided for by law that in their judgment are worthy and for the interest of the county, the fund hereby authorized to be created to be known as the 'Contingent Fund'."

Section 2 of said Act is as follows:

"That $1,200.00 of the Fund herein appropriated per annum shall be paid over to the representative of the State Tax Commission having charge of the equalization and adjustment of taxes on property situated in such counties, for ex officio services and expenses of maintaining his office in said county. Said $1,200.00 per annum to be paid over to the said representative of the State Tax Commission in monthly installments and disbursed by him."

Section 4 of said Act is as follows:

"That, under the provisions of Section 1 not more than $7,000.00 shall be appropriated and expended in any one year and should any sum or sums remain unexpended in said Fund at the end of the year only so much of the appropriation for the next succeeding year as will, together with the sum so remaining unexpended, bring the Contingent Fund up to the sum of $7,000.00."

It is my judgment that your first inquiry must be answered in the affirmative. I am of the opinion that where the Board of Revenue has appropriated to the Contingent Fund moneys under the provision of this Act that such funds remain in the Contingent Fund from year to year unless expended. Section 2 above quoted does not appropriate the sum of $1,200.00 from the General Fund of the county to the reperesentative of the State Tax Commission but merely provides that $1,200.00 of the sum appropriated to the Contingent Fund is to be used to supplement the salary of such representative. In the event the services of that representative are dispensed with the funds appropriated, in my judgment, remain in the Contingent Fund.

I am of the opinion that your second inquiry should be answered in the affirmative. Act No. 468, supra, gives to the Board of Revenue the right to expend not exceeding the sum of $7,000.00 annually for any county purposes not otherwise provided for by law that in their judgment are worthy and for the interest of the county. If the Board of Revenue in its discretion determines that it is to the best interest of the county that additional help be retained to assist in the Tax Assessor's office then, in my judgment, such help could be paid from the Contingent Fund so provided for.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 29, 1937

Hon. James M. Ward,
County Treasurer,
Autauga County,
Prattville, Alabama.

Counties—Alabama Sales Tax Act—Use of money.

County authorized to use proceeds derived from Alabama Sales Tax Act to pay for telephone service for the Welfare Department, coffins, burial expenses and medical aid for paupers, medical attention, care and transportation to hospital for insane and for medical attention for prisoners confined in the county jail as these uses fall within the purview of the Act which designates the use of the money provided said use is in cooperation with the agency designated in Section 21 of the Alabama Sales Tax Act which renders the service.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date, in which you request my opinion as follows:

"Please advise if the following claims can be legally paid out of the Luxury Tax Fund.

"1. Telephone service for Welfare Department.

2. Coffins, burial expenses and medical aid for paupers.

"3. Medical attention, care and transportation to hospital for insane.

"4. Medical attention for prisoners confined in County jail."

Answering your question, it is my opinion that the county is authorized to use the proceeds derived from the Alabama Sales Tax Act to pay for telephone service for the Welfare Department, coffins, burial expenses and medical aid for paupers, medical attention, care and transportation to hospital for insane and for medical attention for prisoners confined in the county jail, as these uses fall within the purview of the Act which designates the use of the money provided said use is in cooperation with one of the agencies designated in Section 21 of the Alabama Sales Tax Act which rendered the services mentioned in your inquiry. See opinion of this office to Dr. J. N. Baker, State Health Officer, Montgomery, Alabama, under date of August 14, 1937, a copy of which is enclosed.

This office has previously held that it was mandatory for the governing bodies of the counties of the State to use the proceeds derived from the Alabama Sales Tax Act exclusively for health service, public welfare and agricultural extension service. Opinion of this office to Hon. P. C. Black, Judge of Probate, Geneva County, under date of April 27, 1937, a copy of which is enclosed for your convenience.

A part of your question has been answered by an opinion of this office to Hon. M. T. Maxwell, Secretary and Purchasing Agent, Board of Revenue, Tuscaloosa County, under date of July 2, 1937, a copy of which is also enclosed for your convenience.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

October 29, 1937

Hon. Frank M. Johnson,
Judge of Probate,
Winston County,
Double Springs, Alabama.

Of $5.00 collected under Act to regulate selling of motor vehicles by non-residents (p. 263, 1936-37 General Acts), probate judge authorized to retain $.50 and pay balance into the school fund.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of October 7, 1937, as follows:

"In Section 2 of an Act, No. 220, H. 45, Poole, we find among other things, when the applicant registering used cars, files his bond and pays the Probate Judge $1.00 for recording fee, he is then to pay $5.00, WHICH SAID SUM SHALL BE BY THE PROBATE JUDGE PAID OVER TO THE COUNTY TREASURY OF THE RESPECTIVE COUNTIES, LESS A FEE OF .50c TO BE RETAINED BY THE PROBATE JUDGE TO THE CREDIT OF THE COUNTY SCHOOL FUNDS, THE SAME TO BE DISTRIBUTED AND DISPOSED OF AS PROVIDED BY LAW.

"Is the $4.50 to be paid to the General Fund of the County and the 50 cents to the credit of the school fund, or is the $4.50 to be paid into the school fund and the 50 cents retained by the Probate Judge as his personal fee?

"We would like to have your opinion on the above question, the way it reads is seems that the $4.50 goes to the county treasury and the 50 cents to the school funds, but, it is not made clear. Will thank you very much for your opinion."

I am of the opinion that under the provision which you mention (1936-37 Acts, page 203), fifty cents should be retained by the probate judge as his personal fee and $4.50 should be paid into the school fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 1, 1937

Hon. J. A. Keller,
Superintendent of Education,
State of Alabama,
Montgomery, Alabama.

1. A County Board of Education is authorized to pay from the proceeds of the county-wide three-mill tax, the actual and necessary expenses of a Board member who is authorized by the said County Board to make certain necessary trips for the purpose of securing funds to be used in the construction of public school buildings in said County.

2. A County Board of Education is authorized to pay from the proceeds of the county-wide three-mill tax, the actual and necessary expenses of teachers sent to Peabody College for the purpose of receiving instruction and advice on solving certain educational problems in said county, where such special course of training, will, in the opinion of the County Board, materially assist the Board in solving the educational problems of the County.

Opinion by the Attorney General.

Dear Sir:

I beg to acknowledge receipt of your letter of June 18, 1937, as follows:

On April 26, 1937, I submitted a request for an opinion from you concerning the interpretation of Act No. 295, approved September 2, 1935, and Act No. 326, approved September 2, 1935. In the same letter I requested your opinion concerning the legality of certain expenditures of the Jefferson County Board of Education. After a careful study of my letter, I find that my request was stated in such form as to be misleading for the reason that it does not set forth clearly the issues involved and does not call for an opinion broad enough to cover all of the questions. I am, therefore, restating this request, setting forth in more detail the actual points at issue and I am requesting that you take this letter into consideration before rendering a final opinion upon the matters involved.

"Section 2 of Act No. 295, approved September 2, 1935, gives the State Board of Education authority to set up regulations for the apportionment of the Minimum Program Fund. Subsection "c" of Section 2 (page 717 of the 1935 General Acts) authorizes the State Board of Education to apportion part of the Minimum Program Fund for current expenses other than teachers' salaries and transportation.

"Section 3 of Act No. 326, approved September 2, 1935, provides that the Minimum Program Fund shall be used 'for providing a minimum term and for the equalization of educational opportunity in the public schools of the State'.

"Article XIX of the Constitution of the State of Alabama provides for the levy of a special county wide school tax for public school purposes not exceeding thirty cents on each one hundred dollars worth of taxable property.

"State auditors have questioned the legality of two items of expenditure of the Jefferson County Board of Education which involve an interpretation of the discretion of county boards of education over the expenditure of funds coming to them from the Minimum Program Fund for 'Other Current Expenses' and also the three mill county wide tax.

"Mr. Raymond E. Thomason, a member of the Jefferson County Board of Education, was authorized by the Board of Education to make certain trips to Washington, to various points in Jefferson County, and to Montgomery for the purpose of securing federal aid for school buildings to be erected in Jefferson County. Mr. Thomason, by virtue of his connection with relief organizations, W. P. A. boards, etc.. was in position to be of more service to the Board of Education in securing funds for school buildings than the County Superintendent of Education. He was able to secure loans and grants in amounts exceeding $1,000.00.

The Board of Education paid him no salary for his services but authorized his actual expenses to be paid. These expenses have been charged against Mr. E. B. Erwin, then Superintendent of Education of Jefferson County Schools. Nevertheless, the County Board of Education felt that it acted in the best interest of the schools of Jefferson County in authorizing this expenditure.

"Assistant Superintendent of Education B. W. Self is directing the work of curriculum study for the Jefferson County schools. In the furtherance of this project, the Jefferson County Board of Education authorized Mr. Self to transport two automobile loads of teachers to the George Peabody College in Nashville on Saturdays for the purpose of receiving assistance from curriculum experts in Peabody College. The Board authorized an expenditure for transportation only for these teachers, believing that this expenditure would benefit the schools of Jefferson County. The work being done by the teachers was part of the state wide program of curriculum revision being promoted by the State Department of Education. This expenditure has been charged against Mr. John E. Bryan, present County Superintendent of Education of Jefferson County. Your opinion is desired upon the following questions:

"1. Does the County Board of Education have the authority to pay the expenses of Mr. Raymond E. Thomason from state funds allotted to that county for 'Other Current Expenses' in the Minimum Program Fund?

"2. Does the County Board of Education have the authority to pay the expenses of Mr. Raymond E. Thomason from the proceeds of the three mill county wide tax voted for public school purposes?

"3. Does the County Board of Education of Jefferson County have the authority to pay the expenses of teachers for the purpose of improving the curriculum of the Jefferson County schools from state funds allotted to that county for 'Other Current Expenses' in the Minimum Program Fund?

"4. Does the County Board of Education of Jefferson County have the authority to pay the expenses of teachers for the purpose of improving the curriculum of the Jefferson County schools from the proceeds of the three mill county wide tax voted for public school purposes?

"Your attention is respectfully called to the following facts bearing upon the questions asked:

Question 1

"Section 3 of Act No. 326, approved September 2, 1935, provides that the Minimum Program Fund shall be used for providing a minimum term and for the equalization of educational opportunity in the public school of the State.

"Act No. 295 sets forth in much greater detail the purposes of the Minimum Program Fund. Section 2 of this act (top of page 716, General Acts of 1935) states that the following costs shall be allowed in the minimum program Fund: Teachers' salaries, transportation, current expenses other than teachers' salaries and transportation, and, for counties excluding cities, capital outlay.

"The term 'equalization of educational opportunity' is a broad term. The county board of education is equalizing educational opportunity when it spends money for anything which improves the educational advantages generally of the children of that county. Undoubtedly, the schools of Jefferson County have been improved by reason of the efforts of Mr. Thomason. Federal funds was made available for school housing, which left local funds available for the extension of the school term and for the provision for additional educational advantages which tend to equalize educational opportunity in Jefferson County. In other words, if federal grants had not been secured to assist Jefferson in providing school buildings, local funds would have been used for that purpose, which would have deprived the children of Jefferson County of certain advantages which they are now enjoying.

"There is no question about a county board of education having authority to pay the expenses of one of its members while he is transacting the business of the Board. That authority is specifically granted in Section 92 of the Alabama School Code of 1927.

Question 2

"The three mill county wide tax of Jefferson County was voted 'for public school purposes'. The county board of education has the authority to spend the proceeds arising from this tax for the public elementary and high schools in its jurisdiction. Mr. Thomason's expenses were athorized by the County Board of Education of Jefferson County for the purpose of securing public school buildings for the county. It seems that there is no question that this expenditure is one for 'public school purposes.'

Question 3

"The points brought out under Question 1 apply to this question. A committee of teachers was selected by the Jefferson County Board of Education to do special Work on improving the courses of study and general instructional offering of all the schools of Jefferson County. In order to further that purpose, these teachers were requested to go to Peabody College for Teachers and consult with curriculum experts on the problems of the Jefferson County schools. They were paid no additional salary for this work. All of the schools of Jefferson County are being benefited by the work accomplished by this committee of teachers. Their efforts have improved the educational offerings of the county school system and therefore are tending to equalize educational opportunity in that county. Therefore, it seems to me that the expenditures of the Jefferson County Board of Education for the purpose of improving the curriculum of the Jefferson County schools comes within the purview of the Minimum Program Act, namely 'providing a minimum term and for the equalization of educational opportunity in the public schools of the state'."

Question 4

"The fact that the Jefferson County Board of Education was spending funds for 'public school purposes' when it was spending money to improve the instructional offering in all of the schools of the county can hardly be questioned. The Board of Education was not paying the expenses of teachers to Peabody College for the purpose of giving those teachers an opportunity to attend school. They were sent to Peabody College for the purpose of securing counsel and advice on solv-

ing certain educational problems which specifically were facing the schools of Jefferson County."

I have considered very carefully everything set forth in your letter. I have examined the Act approved September 2, 1935, referred to as the Minimum Program Act, and I have also examined the Act approved September 2, 1935, known as the Mimimum Program Fund Act. The first mentioned Act bears No. 295 while the sceond Act bears No. 326.

In answer to your first question, it is my opinion that the County Board of Education of Jefferson County has authority to pay the expenses of Mr. Raymond E. Thomason from State funds allotted to Jefferson County for "other current expenses", in the Minimum Program Fund. I have noted carefully the fact relating to the duties performed by Mr. Thomason and it is my judgment that the Board of Education is authorized to pay these expenses incurred by Mr. Thomason.

In answer to your third question, it is my judgment that the County Board of Education of Jefferson County has authority to pay the expenses incurred by teachers who have taken courses designed to instruct them in improving the curriculum of the Jefferson County Schools, and that such expenses may be paid from funds allotted to that County for "other current expenses" in the Minimum Program Fund. In paying the expenses of teachers who are taking training for the purpose of improving the curriculum of the Jefferson County schools, it is my judgment that the County Board is engaged in equalizing educational opportunities in Jefferson County.

In the case of the teachers who are sent to the George Peabody College in Nashville for the purpose of receiving assistance from curriculum experts in Peabody College, it is my opinion that the County Board of Education in so acting was engaged in the very thing mentioned in the Minimum Program Act, namely: "Providing * * * for the equalization of educational opportunity in the public schools of the State".

It is, therefore, my judgment that the County Board of Education of Jefferson County is well within its legal right in paying the two items mentioned hereinabove. I note that a member of the Jefferson County Board of Education was authorized by the County Board of Education to make certain trips to Washington, to visit various places in Jefferson County, and to make several trips to Montgomery for the purpose of securing Federal aid for school buildings to be erected in Jefferson County. The Jefferson County Board of Education evidently believed these trips necessary. It is my judgment that what this Board member did, (which was authorized by the County Board of Education) was done in the interest of the public schools of Jefferson County. In other words, it appears clear that what Mr. Thomason did was for public school purposes. In my judgment the proceeds of the three mill county-wide tax may be used for such a purpose.

The answer to question number 2 makes it unecessary to answer your question number 1.

In answer to your question 4, it is my judgment that the County Board of Education of Jefferson County is authorized to pay the actual and necessary expenses incurred by teachers in improving the curriculum of the Jefferson County Schools, and that such expenses may be paid from the proceeds of the three-mill county-wide tax, which tax is voted for public school purposes. It seems clear that the funds expended by the County Board of Education of Jefferson County in sending these teachers to Pea-

body College to receive advice and instruction on and about solving certain educational problems in Jefferson County, was expended for public school purposes. It is my judgment that these reasonable expenses may be paid from the county-wide three mill tax, which tax is levied in Jefferson County for public school purposes.

The answer to your question number 4 makes it unecessary to answer your question number 3.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 2, 1937

Hon. A. F. Harman, President,
Alabama College,
Montevallo, Alabama.

1. Alabama College—An agency of the State and is not liable for torts by officers.

2. Officer of Alabama College negligently driving automobile is personally liable for any injury caused by his negligence.

3. If tort feasor is minor, recourse would be against minor and not against parents or the college.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of October 14, 1937, in which you request my opinion as follows:

"Alabama College owns and operates two automobiles for the official use of certain members of the faculty and officers of the College and also for the use of certain students whose work necessarily requires them to leave the campus. These students, in some cases at least, are minors over the age of sixteen years.

"The premises above considered, will you kindly give me your opinions as follows:

"1. What liability is attached to the College in the operation of these automobiles by officers, members of the faculty, or students of the College in pursuance of their respective duties?

"2. If no liability attaches to the College, in the event of an accident while said college owned car is being driven by an officer, member of the faculty or student of the College, who is liable?

3. If tort feasor is minor, recourses would be against minor and party be against the minor student, the parents, or the College?

"It is important that we have your opinions in reply to these inquiries in order that the designated persons, as well as the College, may understand fully what liability, if any, attaches."

1. In my opinion, the Alabama College is under no liability in regards to the operation of these automobiles either by officers, members of the faculty or students. The Alabama College is an agency of the State of Alabama. School Code of Alabama, Section 500, **Alabama Industrial School v. Reynolds,** 143 Ala. 179. Such agency of the State is not liable for the torts of its officers. Quarterly Report of Attorney General, Volume 4, page 6.

2. The exemption from liability in favor of the college would not in my opinion relieve the negligent driver of said automobile from personal liability for any damages caused by his negligence.

3. Under the laws of Alabama, a minor is liable for his torts. The parent of such minor is not liable therefor. **Parker v. Wilson,** 179 Ala. 361, 60 So. 150, 43 L. R. A. (N.S.) 87.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 2, 1937

Hon. B. M. Davis,
Tax Assessor,
Cherokee County,
Centre, Alabama.

Owner of property not actually residing thereon but cultivating same, on which sister resides, not entitled to claim homestead exemption under homestead exemption statute (General Acts 1936-1937, page 113).

Opinion by Assistant Attorney General Thomas.

Dear Sir:

I have your letter of September 28, 1937, in which you request my opinion as follows:

"Mr. G. H. Farmer, a single man, owns some farm acreage and cultivates same. He has a widowed sister actually residing on his property. Said G. H. Farmer, a single man, lives with his father, H. P. Farmer, and the father has claimed homestead. They all probably contribute to the support of the widowed sister living on farm of G. H. Farmer. G. H. Farmer occasionally keeps his workstock on his farm and occasionally takes meals with his sister.

"Can G. H. Farmer claim homestead exemptions under the above conditions?"

I am of the opinion that Mr. Farmer is not entitled to claim a homestead exemption on his said property, as he does not reside thereon.

The Homestead Exemption statute reads as follows:

"Section 1. The Word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and laws of the State of Alabama.

"Section 2. Homesteads, as herein defined, are hereby exempted from all State ad valorem taxes beginning October 1, 1937.

"Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed Two Thousand Dollars ($2,000.00) in assessed value nor one hundred sixty (160) acres in area.

"Approved February 20, 1937."

A Homestead must be the place of actual residence.

McConnaughy v. Baxter, 55 Ala. 379; David's Adm'r v. David, 56 Ala. 49; Preiss v. Campbell, 59 Ala. 635; Waugh v. Montgomery, 67 Ala. 573.

The case of Wildman v. Means, 94 So. 823, 208 Ala. 487, hold that: "where the mortgagor of a U. S. homestead entry land maintained his home on the place where his wife lived, but not on the homestead entry mortgaged, but he satisfied the requirements of the laws of the U. S. by having his mother and sister live on it, his homestead entry land was not his homestead within Constitution 1901, Section 205, of the Laws of the State."

From the above authorities cited, I am of the opinion that Mr. Farmer is not entitled to a homestead exemption.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 2, 1937

Hon. Harry Martin,
Clerk, Circuit Court,
Choctaw County,
Butler, Alabama.

Local Act No. 625, Local Acts of 1931, page 280, (regulating fine and forfeiture fund of Choctaw County, Alabama), modifies Local Act No. 336. Local Acts, 1886-87, page 670, (regulating the fine and forfeiture fund of Choctaw County, Alabama), by repealing all provisions therein relating to witness or claim tickets.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 17, 1936, in which you request my opinion as follows:

"Please refer to page 760 of the Acts of Alabama of 1886 and 1887, Bill No. 336, Section 4 thereof and advise me if this law has ever been amended or repealed, in order that I may know whether to accept registered script in payment of fines."

In answering the above, I call your attention to an Act of the Legislature approved July 30, 1931 (Local Acts, 1931, page 280). This Act purports to regulate the law of Choctaw County in reference to its Fine and Forfeiture Fund, and in my judgment, repeals the Act you refer to, so far as the payment of fines by witness certificates is concerned, that is, local act for Choctaw County, approved December 11, 1886 (Acts of Alabama, 1886-87, page 759). It is impossible to give both of these Acts a field of

operation so far as this particular item is concerned and the Act of 1931, supra, contains a repealing clause of all laws, local and general, in conflict and make no provision for witness certificates which are chargeable to the Fine and Forfeiture Fund of your county to be received in the payment of fines imposed in said county, though Section 9 of said Act does provide that this Act shall not be construed to prevent the payment of fines by officers' scrip as now provided by law. The Local Act of 1886-87, supra, provides among other things, for the payment of fines upon proper registration in officers' scrip. Therefore, it seems very clear to me to be the legislative intent to repeal all that part of the Act of 1886-87, supra, which provides for the paying of fine in scrip going to witnesses. This section is as follows:

> "Section 9. Provided nothing in this act shall prevent officers from paying fines with officers' scrip as now provided for under the General and Local laws governing the Fine and Forfeiture fund of Choctaw County, Alabama."

Therefore, it is my opinion scrip or cost growing out of officers' fees which are chargeable to the Fine and Forfeiture Fund of Choctaw County may still be received in payment of fines when properly presented, though scrip going to witnesses may not be.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 2, 1937

Hon. C. E. McNatt,
Circuit Court Clerk and Ex-Officio Clerk,
Law and Equity Court, Franklin County,
Russellville, Alabama.

1. When the prosecutor becomes a witness for the state in a criminal case he is entitled to his per diem and mileage as a witness.

2. When the sheriff or his deputies are summoned as witnesses for the state in a criminal prosecution, such sheriff or deputy is entitled to his per diem and mileage as such witness.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 19, 1937, in which you request my opinion as follows:

> "John Smith is not an officer of any kind but is a private citizen of the county. John Smith appeared before the Clerk of the Law & Equity Court and commenced a prosecution by making a proper affidavit charging Bill Jones with public drunkness. The clerk of the Law and Equity Court issued a warrant of arrest on this affidavit and the public drunkness case was placed in the trial docket for trial. The said John Smith who commenced the prosecution was summoned as a state witness. A subpoena was issued for Smith by the clerk and was served by the sheriff. Smith appeared as a witness for the state.

"Inasmuch as Smith was the prosecutor who commenced the prosecution, is he entitled to draw pay as a state witness? Also is a sheriff or deputy sheriff who starts a prosecution entitled to pay as a state witness?"

My answer to both of your inquiries is in the affirmative. The fact that the prosecutor becomes a witness of the state on the trial of the defendant does not bar him from receiving pay as such witness.

This office has held that when the sheriff or his deputies are summoned as witnesses for the state in a criminal case, they are entitled to their per diem and mileage.

I am enclosing herewith the opinion referred to above written to Hon. Howard Kirby, Clerk, Circuit Court, Gadsden, Alabama under date of July 12, 1935.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 3, 1937

Hon. N. P. Tompkins,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

The County Commissioners of Colbert County may acquire lands by purchase in fee simple and by condemnation and convey the same to United States for the Natchez Trace Parkway through said County.

Opinion by Assistant Attorney General Thomas.

Dear Sir:

I have your letter of September 27, 1937, which reads as follows:

"The Appropriation Act for the Department of the Interior, H R. 6958, passed at the last session of Congress, appropriated the sum of $1,500,000.00 for the Natchez Trace Parkway to be immediately available and remain available until expended, such sum to be allotted and expended ratably between the States of Mississippi, Alabama and Tennessee, according to the mileage of said Parkway in each respective State.

"The County Commissioners of Colbert County are anxious that the necessary steps be taken to expedite the acquisition of sufficient parkway lands satisfactory to the Federal Government regulations. The Question has arisen as to the authority of the County, or some State Agency, to acquire lands in fee simple for the Natchez Trace Parkway and to convey the same to the United States. The National Park Service regulations require that the fee simple title in right-of-way Parkway lands be conveyed to the United States before construction work commences.

"I therefore request that you furnish me your opinion on the following questions:

"1. Has Colbert County authority under the laws of Alabama to acquire by purchase in fee simple, lands for the Natchez Trace Parkway and to convey the same to the United States?

"2. Has Colbert County authority under the laws of Alabama to acquire by condemnation lands for the Natchez Trace Parkway and to convey the same to the United States?

"3. Has the County authority to appropriate funds for the acquisition of lands for the Natchez Trace Parkway for the purpose of transferring the same to the United States?

"4. Has the State Commission of Forestry authority to acquire lands for the Natchez Trace Parkway in Alabama and transfer the same to the United States, under the provisions of Section 989 of the Code of Alabama of 1923, as amended by Section 1 of the Act approved March 2, 1937, (Acts 1936-1937, Extra Session, page 183), or under any other Statute of Alabama?

"5. In the event you rule that the County does not have authority to purchase or condemn such lands and convey them to the United States for the Natchez Trace Parkway, and some State Agency has such authority, could the County appropriate funds to such State Agency to be used in the acquisition of such lands?"

I understand the Natchez Trace Parkway system is a highway system, and I am therefore of the opinion that question 1, 2, and 3, should be answered in the affirmative. Subsection 1 of Section 6755, Code of Alabama, 1923, as amended by General Acts, 1931, page 759, and General Acts 1933, page 201, gives a Court of County Commissioners authority:

"to direct and control the property of the county as it may deem expedient according to Law."

Section 1347, Code of Alabama, 1923, reads as follows:

"1347. (5765) Powers of courts of county commissioners with regard to roads, bridges, and ferries.—The Courts of County Commissioners, boards of revenue, or other like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties, and may establish new, and change and discontinue old roads, bridges and ferries in their respective counties so as to render travel over the same as safe and convenient as practicable. **To this end they have legislative, judicial, and executive powers, except as limited in this article.** Courts of County commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges, and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the State. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public road, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

In construing said Section 1347, Justice Gardner in the case of Court of Commissioners of Pike County v. Johnson, 157 So. 481, on page 484, says:

"3. Many of the acts of the governing body in relation to roads are legislative in character. The levy of road taxes, the allocation of same, the location, establishment, change, or discontinuance of roads, the making of contracts, adoption of rules and regulations, providing a set-up or system of road construction and maintenance, selecting the agent and employees, prescribing their duties and compensation, are all governmental in character, for the most part legislative."

Question 2 is affirmatively answered by Section 1352, Code of Alabama, 1923.

I am of the opinion that question 4 should be answered in the affirmative. Section 989. Code of Alabama, 1923, as amended by Section 1 of the Act approved March 2, 1937, (Acts 1936-1937, Extra Session, page 183) expressly gives the Forestry Commission such authority.

I call your attention to an opinion from this office under date of January 5, 1934, (1932-1934 Biennial Report, Attorney General, page 456), in which this office ruled that Morgan County could deed property to the Federal Government for building purposes.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 2, 1937

Dr. J. N. Baker, M. D.,
State Health Officer,
Capitol.

Payment by the Comptroller during the fiscal year ending September 30, 1937, of only sixty-five percent (65%) of appropriation to the Health Department for carrying on non-essential functions of government, does not bar said department from receiving full payment of such appropriation, if at the end of the fiscal year the Comptroller discovers there is available revenue in the General Fund for the full payment of such appropriation; full payment of such appropriations having been formerly demanded by the said Health Department at the beginning of each quarter during said fiscal year.

Opinion by the Attorney General.

Dear Sir:

Your inquiry of November 1, 1937, has been received. We also acknowledge receipt of a copy of the quarterly "requisition for allotment" and a copy of the letter that accompanied the quarterly "requisition for allotment." Your letter follows:

"You will recall that prior to November 9, 1932, the State Department of Health operated under appropriations to this Department totalling $686,000.00 per year. On November 9, 1932, this appropriation was reduced from $686,000.00 to $430,000.00 per year. Since November 9, 1932,

the Department of Health has operated under the Act approved November 9, 1932, which provides for an annual appropriation of $430,000.00.

"From November 9, 1932, down through the last quarter in the fiscal year 1936-37, this Department has received various prorations of its appropriations, having received for the fiscal year ending September 30, 1937, 65% of its appropriations for non-essentials.

"It is our understanding that the Department of Health for the fiscal year 1936-37, is entitled to full payment of its entire appropriation of $430,000.00. If the revenue is available, we understand there is no field of operation for the proration provided in the Budget Act.

"It will be recalled that this Department did not at any time during the preceding fiscal year, do anything that could be construed as waiving payment of its full appropriation. To the contrary, we have all along during the preceding fiscal year made known that we were seeking full payment of the appropriation to this Department. At the beginning of each quarter during the fiscal year 1936-37, we made known to the Governor and the Comptroller that we expected full payment of all appropriations to this department. Attached is evidence in support thereof. At the beginning of each quarter, we submitted our requisition to the Governor and to the Comptroller making known to each that we were desirous of receiving the full amount we were entitled to, on a quarterly basis. In other words, at the beginning of each quarter, we made known to the Governor and the Comptroller that our needs required $107,500.00, which is one-fourth of our entire appropriation of $430,000.00.

"We were advised by the Comptroller during the fiscal year 1936-37, that our entire appropriation of $430,000.00 could not be paid because of lack of revenue and that our appropriation would have to be satisfied on a basis of paying 65%. Because of this, we had no other alternative than to proceed as best we could on the amount of money that the Comptroller advised us would be available, insisting, however, at the beginning of each quarter, that we were entitled to the full amount. As we understand, it is impossible for the Comptroller to arrive at the exact amount to be paid until the end of the fiscal year. As we understand, the law provides for a re-arrangement of the funds to be applied to non-essential appropriations at the end of the fiscal year.

"Are we not at this time entitled to full payment of our appropriations, if the revenue is available? In other words, are we not entitled, provided the revenue is available, to full payment of our appropriations for the year 1936-37?

"You will recall that the Department of Health received $197,100.00 on a non proratable basis, for the handling of functions designated essential functions of government. There was a balance, however, of $232,900.00 which was paid on the basis of 65%, and it is to this latter figure that our inquiry is directed. Are we not now entitled to full payment of any balance remaining unpaid, of the $232,900.00,"

REQUISITION FOR ALLOTMENT
OF
AMOUNT NECESSARY FOR OPERATION
OF
THE STATE DEPARTMENT OF HEALTH

OCTOBER 1—DECEMBER 31, 1936

| | |
|---|---|
| Administration (including County organization) | $ 9,875.00 |
| Hygiene and Nursing | 3,375.00 |
| Laboratories | 12,250.00 |
| Contagious Disease Control | 10,375.00 |
| Sanitation | 10,250.00 |
| Vital Statistics | 4,875.00 |
| State Supplement to Counties | 49,000.00 |
| | $100,000.00 |

REQUISITION FOR ALLOTMENT
OF
AMOUNT NECESSARY FOR OPERATION
OF
THE STATE DEPARTMENT OF HEALTH
PASTEUR FUND

OCTOBER 1—DECEMBER 31, 1936

| | |
|---|---|
| Pasteur Fund | 7,500.00 |

"September 11, 1936

Honorable Bibb Graves, Governor,
State Capitol,
Montgomery, Alabama.

My dear Governor:

As required by Section 20 of the Budget and Financial Control Act, I am furnishing you herein requisition for allotment of the amount estimated to be necessary to carry on the work of the State Department of Health during the quarter October 1—December 31, 1936.

The estimate is based on the appropriation made by the Legislature of 1935 for the operation of the department.

Respectfully yours,
J. N. BAKER, M. D.,
State Health Officer."

In order that we may understand one another as to what the facts are, I beg to repeat the facts as I understand them: Since November 9, 1932, the Department of Health has functioned under an appropriation of $430,000.00 per year. From November 9, 1932, down through the last quarter of the fiscal year 1936-37, your Department has received various prorations of its appropriations, having received for the fiscal year ending September 30, 1937, all of your "essential governmental functions" appropriations and

65% of your appropriation for carrying on non-essential functions of government. In other words, during the fiscal year ending September 30, 1937, you received $197,100.00 on a non-proratable basis, which moneys were used in carrying on essential functions of government, and you received only 65% of the balance of your appropriations. The balance of your appropriation amounts to $232,900.00, and you received 65% of the $232,900.00. You state that the $232,900.00 represents appropriations for carrying on non-essential functions of government. So, you have received $197,100.00 (for carrying on essential functions of government) and 65% of $232,900.00, the 65% of the $232,900.00 having been used for carrying on non-essential functions of government. The $197,100.00 plus the $232,900.00 equal the amount of your entire appropriation, $430,000.00.

At the beginning of each quarter during the fiscal year ending September 30, 1937, you submitted to both the Governor and the Comptroller a requisition for allotment, in which you claimed one-fourth of your entire appropriation. This requisition for allotment shows that during each quarter of the fiscal year ending September 30, 1937, you made formal demand on both the Governor and the Comptroller for payment of $107,500.00, representing one-fourth of your annual appropriation of $430,000.00. Along with the quarterly requisition for allotment you dispatched a letter to the Governor and the Comptroller, in which you claimed one-fourth of your annual appropriation. This requisition for allotment of funds, together with the accompanying letter, were dispatched to both the Governor and the Comptroller at the beginning of each quarter of the fiscal year ending September 30, 1937.

Having received during the fiscal year in question $197,100.00 on a non poratable basis, you are no longer interested in that part of the appropriation. But you received only 65% of the $232,900.00, the part of your appropriation used for carrying on non-essential functions of government. Your inquiry is directed to the balance of the $232,900.00. You inquire whether or not you are at this time, under the facts stated, entitled to the balance of 35%. Stated a little differently, you inquire whether or not you are entitled to receive at this time 35% of $232,900.00.

During the fiscal year in question, you state that the Comptroller advised you that there was available only sufficient revenue to pay 65% of your appropriation devoted to carrying on non-essential functions of government and that you accepted the same, making formal demand, however, at the beginning of each quarter for the full amount of your appropriation.

Your inquiry involves both questions of law and fact. The question of fact involved is as follows: Was there a sufficient amount of revenue in the General Fund of the State to pay the entire $232,900.00? If there was a sufficient amount of money in the General Fund at the expiration of the fiscal year ending September 30, 1937, then and in that event, under the facts stated in your inquiry, you are entitled at this time to payment of the balance of 35%. All of your appropriation comes from the General Fund of the State. You made demand quarterly for one-fourth of your entire yearly appropriation. You received only 65%. The Comptroller's estimate during the fiscal year was that only 65% of your appropriation for carrying on non-essential functions of government was available. If at the end of the fiscal year the Comptroller discovered that his estimate of 65% was an error and, if at the end of the fiscal year the revenues in the General Fund were sufficient to pay the entire balance, then you are entitled to the entire balance of 35%. The fact that the balance is paid after the expiration of the fiscal year is immaterial, for the reason that the 65% paid your Department was based upon only an estimate. You accepted this

estimate, but if upon a rechecking at the end of the fiscal year, the Comptroller discovers that the revenue is available for full payment of your appropriation, then you are entitled, in my judgment, to the entire balance of 35%.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 4, 1937

Hon. J. A. Lee,
Superintendent of Education,
Dallas County,
Selma, Alabama.

County School Tax—Election—

Election to determine levying of one mill county school tax and three mill county school tax may be held on same day.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of October 20, 1937, in which you request my opinion as follows:

"The County Board of Education of Dallas County is desirous of holding an election to determine whether or not the one mill county school tax shall be levied as provided in the provisions of Article 12 of the 1927 school Code.

"They also intend to call an election to determine whether or not the three mill county tax shall be levied as provided for under Article 13 of the 1927 School Code.

"I respectfully request your opinion as to whether or not there is any legal reason why the two elections could not be held on the same day and by the same officials."

In my opinion there is no legal reason why the two elections referred to should not be held on the same day and by the same officials. The provisions of Article 12 and 13 of the School Code of 1927, regulating such elections, have no contradictory provisions. Nothing in this opinion, however, is to be construed as affecting the right to hold an election to determine the levying of a county school tax on the same day as an election to determine the levying of a district school tax.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

November 5, 1937

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Transportation company with its principal place of business at Memphis, Tennessee, not liable for ad valorem tax on busses operating between Memphis and points in Alabama where such busses remain in Alabama only a short time and return to the principal place of business of the company.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

Your letter of October 26, 1937, addressed to Mr. Jack B. Powers, Chief Clerk of the Automobile Tax Department of the State Tax Commission, has been referred to this office for attention. Your letter is as follows:

"The Dixie Greyhound Lines, Inc. of Memphis, Tenn. have applied to me for bus tags for various busses. On the application they have typed the following: 'Busses used in interstate traffic only, taxable situs not in Alabama but Memphis, Tenn.'

"They refuse to pay ad valorem tax in this state and have furnished me with receipts from Tennessee showing taxes paid in that State.

"This company operates between Memphis and Birmingham and run into the depot of Greyhound Bus Company here and use their garage for their busses when in Bham. so I have been informed by the manager of the Greyhound Company with offices on 6th Ave. and 19th St.

"I will appreciate it if you will get me a ruling from the Attorney General or advise me yourself whether or not this company is liable for ad valorem taxes."

The conclusions hereafter reached are based on the facts set out in your letter, namely, that the transportation company under consideration has its principal place of business in Memphis, Tennessee, and is paying taxes on the property in question in that place; that the property in question is used in interstate traffic only, operating between Memphis, the principal place of business of the corporation and Birmingham.

It is my opinion from the facts stated in your letter that the said transportation company is not liable for the payment of ad valorem taxes on the busses used in traffic between Birmingham and Memphis, the principal place of business of the said corporation.

The rule in this state as to the taxation of personal property is laid down in the case of **State v. Tennessee Coal, Iron and R. R. Co.**, 188 Ala. 514, 524, and is as follows:

"The situs of personal property, whether tangible or intangible, for the purposes of taxation, unless otherwise provided by statute, is at the place of residence of the owner."

It has been held or recognized that the fact that a foreign corporation maintains a business office at a certain place within a state does not make it a resident or an inhabitant of such place in the sence of fixing its domi-

cile or residence at such place for the purpose of the taxation there of its personal property within the state. **Boston Investment Company v. Boston,** 33 N. E. 580, 158 Mass. 461, **Southern Express Company v. Patterson,** 123 S. W. 353, 122 Tenn. 279. It is my opinion that the same general rule applies in this case as has been applied to the case of rolling stock of a railroad company, which is that rolling stock of a railroad company is personal property and as such is taxable to the company in the state of its domicile.

It is, of course, within the power of the Legislature to enact a law providing for the taxation of this type of personal property as was done in the case of rolling stock of railroads by Section 110 of the 1935 Revenue Act. But in the absence of any such express statutory enactment, it is my judgment that the busses used as stated in your letter are not subject to ad valorem taxation in this state, and that license tags therefor should be issued upon presentation of a certificate to the effect that no tax is due.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 8, 1937

Hon. I. A. Keener,
County Solicitor,
Cherokee County,
Centre, Alabama

County Financial Control Law—1. Court of County Commissioners must appropriate such funds as they deem necessary to proper departments.

2. Acts of 1936, Extra Session, page 168—Claims of local registrars for gathering of vital statistics, payable out of general fund of county.

3. Drugs for indigents may be paid out of funds allotted to county health department.

4. Act of Special Session, 1936-37, p. 230, Vaccination of dogs under said act may be done by any competent veterinarian.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of October 14, 1937, in which you request my opinion as follows:

"I herewith ask you for a ruling on whether or not you would construe the division of our sales tax in this county as would in your opinion allow the health department to function adequately as per the amounts given the other departments.

| | |
|---|---|
| "Share alloted the Health Department | $190.00 which is 19.5 % |
| Share alloted Farm Bureau | 335.00 which is 34.33% |
| Share alloted Welfare Bureau | 450.00 which is 46.34%. |

"The above amount of $190.00 per month was alloted to the Health Department. I enclose herewith a copy of the notice to the Health Department and you will note that they say this amount must cover drugs etc. The Clerk of the Court said the etc., meant paying the registrars for getting up the births and deaths in the county. They had been furnishing some drugs for those unable to procure any medicine. The Health Officer is not supposed to give medicines of any kind, but when they did away with the almshouse, the county health officer told the court he did not mind being bothered with the indigents if they would furnish the drugs. Now, they notify him these drugs must come out of the allotment. My understanding that the gathering of vital statistics must be paid out of the general fund of the county and any drugs that might be purchased and given to the indigents might come out of the general funds of the county.

"I am also enclosing a certificate for the vaccination of a dog which the owner carried over in Georgia and had it inocculated and brought the dog back in Alabama. He did this because he could get it done for 75c, whereas he would have had to pay the sum of $1.00. Had he brought the dog out when the inspector was around, it would have cost him only 50c. I hold that our law has not been complied with. Many others have carried their dogs to this man. No certificates but this one has come into this office. This Veterinarian lives in Georgia."

You enclosed with your letter a notice from the Board of Commissioners to the County Health Officer to the effect that the board met in special session for the purpose of making up the budget and setting up appropriations for the several departments for the fiscal year 1937-38. The notice proceeds:

"They have appropriated the sum of ONE HUNDRED NINETY DOLLARS ($190.00) per month to your department, which is to cover all expenses of your department, including drugs, etc., so far as the county is concerned."

(1) In your letter, you apparently wish this office to supervise the amounts which are alloted by the Board of Commissioners to the various departments of the county. This office has the duty of advising county officers as to the law, but as to matters within the financial discretion of the board of county commissioners, this office has no authority to supervise. The notice referred to makes no reference to any division of the sales tax but is apparently only the notice of the appropriation made pursuant to the requirements of the County Financial Control Law (General Acts, 1935, p. 804.) Under Section 3 of this act the county governing body is required to make a budget for the coming fiscal year and set in advance the necessary appropriations for the various departments. As to the proper distribution of proceeds of sales tax by counties, see opinion to the State Health Officer, dated August 14, 1937. In my opinion the amount to be appropriated is within the discretion of the Board of Commissioners and is not subject to the control and supervision of this office.

(2) Your next inquiry is whether the claims for gathering vital statistics must be paid out of the general fund of the county. In my opinion this question should be answered in the affirmative. Under the Acts of 1936, Extra Session, p. 168, such claims are made preferred claims against the county treasury. In my opinion therefore, such claim is a claim against the general fund of the county.

(3) Your next inquiry is whether drugs purchased by the County Health Office for indigents should come out of the general funds of the

county. In my opinion such drugs may be paid out of the general fund but may also be paid from the funds otherwise ear-marked for health purposes. Under the provisions of Code Section 2788, such drugs for indigents may be purchased and paid for "out of the proper fund." This does not require therefore, that such drugs be paid out of the general fund, but the governing body may also purchase them out of funds ear-marked for health purposes.

(4) The next inquiry involves the proper construction of Act 200, Special Session of 1936-37. (Acts 1936-37, p. 230). Section 3 of this Act requires an inocculation by—"the rabies inspector, by any competent veterinarian or other person duly qualified by the respective county board of health." The words "by any competent veterinarian" in my opinion, includes a competent veterinarian in the State of Georgia. There is no requirement in the Act that such veterinarian live within the State of Alabama, and if such veterinarian is competent and has executed the proper certificate, in my opinion, the law has been complied with.

As requested, certificate of Rabies Vaccination is herewith returned.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 8, 1937

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

Alabama Cooperatives' Financing Corporation, Inc., an agency of the United States Government, not subject to mortgage privilege recording tax.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt in today's mail of a letter from you which is as follows:

"I have had presented to me for recording a paper executed by Alabama Cooperative industries, Inc. Group No. 5, of Greenville, Alabama, to Alabama Cooperatives' Financing Corporation, Inc., of Montgomery, Alabama, copy of which is attached hereto.

"I am informed that the paper secures a loan of Federal Relief Funds advanced to this group with which to pay labor, operating expenses, etc., and that the lending agency was set up by the Alabama Relief Administration for the express purpose of handling the Federal Funds, because it was known that the Alabama Relief Administration would soon close up and then this agency, incorporated as a non-profit corporation, would continue to operate and handle these funds to a conclusion.

"I shall appreciate receiving your opinion as to whether the paper, copy of which is attached, requires the payment of a mortgage tax for recording."

From the facts set out in your letter, I am of the opinion that the Alabama Cooperatives' Financing Corporation, Inc., is an agency of the United States Government, and as such is not liable for the mortgage privilege tax.

I refer you to an opinion of this office written to the Probate Judge of Pike County on June 29, 1934. Biennial Report 1932-34, page 593.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 9, 1937

Hon. Henry S. Long,
Chairman, State Tax Commission,
CAPITOL.

Taxation—Motor vehicle licenses—

State Tax Commission held to have authority to promulgate reasonable rules and regulations concerning the application for motor vehicle licenses and tags.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 3, 1937, which follows:

"We are attaching hereto certain rules and regulations governing the issuance of motor vehicle licenses which the State Tax Commission is preparing to adopt.

"Please advise us if said rules and regulations can legally be adopted by the Commission under the Motor Vehicle Laws of Alabama."

The rules and regulations which you are preparing to adopt, a copy of which was attached to your letter, are as follows:

"After the delinquent date each license year, no motor vehicle license shall be issued until the person applying for such license shall have filed in duplicate with the Probate Judge or Commissioner of Licenses: (1) A Bill of Sale (or copy of same) to the motor vehicle for which license is sought; (2) an affidavit sworn to before a Notary Public by the seller (if a firm, or corporation, by an officer of the firm or corporation, and his title) that the Bill of Sale attached to the affidavit is a true and correct Bill of Sale and that the date on said Bill of Sale is the date on which said vehicle was sold to the buyer named in said Bill of Sale, and that the said vehicle named therein was————operated by anyone on the highways of the State of Alabama while in his possession since the beginning of the license year; (3) also an affidavit sworn to before a Notary Public by the applicant that the vehicle for which he is making application for license has————been operated on the highways of the State of Alabama by anyone since it came into his possession since the beginning of the license year.

"Provided, however, that if the applicant owned the vehicle for which license is sought prior to the beginning of the license year he shall not be required to file Bill of Sale or affidavit from the seller. Provided,

further, that if the vehicle for which license is sought has been sold more than once since the beginning of the license year, the Bill of Sale for each such sale and affidavit by each seller shall be filed."

In my opinion, the State Tax Commission has the power and authority to adopt the rules and regulations above set out.

Schedule 158.13, subsections (c) and (d) of the 1935 Revenue Act read as follows:

"(c) The State Tax Commission shall provide tags for all motor vehicles, and shall also provide receipts in triplicate, one of which shall be retained by the probate judge, one shall be delivered to the person paying the license fee, and one legible copy shall be mailed by the probate judge to the State Tax Commission on the day the license was issued. (d) Every part of each receipt shall bear the same number as the tags delivered to the licensee. These receipts shall be prepared in the form to be determined by the State Tax Commission and delivered to the several probate judges of the several counties of the State, under such rules and regulations as may be prescribed by the State Tax Commission; and **the State Tax Commission shall have power to prescribe rules and regulations concerning the application for and delivery to the licensee of the tags and receipts required by this Act.** Provided, however, that the automobile licensee shall be required to state in his application where he proposes to use his automobile, whether for private use or for commercial purposes." (Emphasis ours).

You will note from the above quoted provisions of the 1935 Revenue Act and especially from the emphasized part thereof that the State Tax Commission has been invested by the Legislature with the power to prescribe rules and regulations concerning the application for and delivery of motor vehicles licenses and tags. Of course, such rules and regulations prescribed by the State Tax Commission must be reasonable. The rules and regulations above set out, which your Commission is preparing to adopt, only require that the applicant furnish certain information concerning the ownership of the vehicle for which license is sought during the license year and information as to whether or not the said motor vehicle has been operated on the highways of the State of Alabama since the beginning of the license year. All of this information sought to be required by these rules and regulations has a material hearing on the amount of licenses and fees the applicant will have to pay on his motor vehicle. Therefore, it is my opinion that the State Tax Commission has the power and authority to adopt the rules and regulations set out hereinabove.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 9, 1937

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama

Alabama Beverage Control Act—Method to be used in determining population of an incorporated city or town—

1. Alabama Alcoholic Beverage Control Board shall determine the population of incorporated cities and towns in such manner as it may prescribe and as will be satisfactory to it.

2. The population within the police jurisdiction of an incorporated city or town, but without the corporate limits thereof, cannot be included in arriving at the population of the city or town.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have a letter under date of October 11, 1937, from Hon. John D. McNeel, the then administrator of the Alabama Alcoholic Beverage Control Board, which follows:

"The Beverage Control Act in the defining of hotels and restaurants states: '(c) The term "hotel" shall mean an establishment within incorporated cities or towns of not less than 4,500 population or within the police jurisdiction thereof.'

"(1) What census figures are used in determining the status of such restaurants or hotels?

"(2) Can the population of police jurisdiction be included in determining whether the restaurant or hotel is located in a municipality of 4,500 population or more?

"(3) Can a school census be used in determining the population of municipalities for the purpose of defining restaurants or hotels as set forth in the Beverage Control Act?

The provision of the Alabama Beverage Control Act pertinent to your inquiry is the following excerpt from subsection (c) of Section 2 thereof:

"The term 'hotel' shall mean establishments within incorporated cities or towns of not less than four thousand five hundred or more than twenty-five thousand (25,000) population or within the police jurisdiction thereof."

In regard to your first inquiry, I call your attention to the fact that the Alabama Beverage Control Act, in dealing with incorporated cities and towns of a certain population, does not make any mention whatever of the population set out therein being based on or determined by any certain census. As a matter of fact, it does not make any reference to a census whatever, nor does it prescribe what basis shall be used for determining the population. Therefore, it is my opinion that the population of an incorporated city or town referred to in the quoted excerpt from the Act means the population of the city or town at the time the Board is called upon to act, and that this population should be determined by the Alabama Alcoholic Beverage Control Board in a manner to be prescribed by, and satisfactory to, it.

Your second inquiry must be answered in the negative. That is, in determining the population of an incorporated city or town, the population within the police jurisdiction, but without the corporate limits thereof, cannot be included in the population of the city or town. As I read and understand the above quoted provision of subsection (c) of Section 2 of the Alabama Beverage Control Act, the clause "or within the police jurisdiction

thereof" does not refer to the place, space or area in which the population referred to is located, but rather that it refers to the place, space or area within which a hotel may be located.

My answer to your first question obviates the necessity of an answer to your third question.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 9, 1937

Board of Revenue,
Barbour County,
Clayton, Alabama.

Board of Revenue can legally appropriate county funds to install and maintain an exhibit of the agricultural resources of the county.

Opinion by Assistant Attorney General Lawson.

Gentlemen:

This is to acknowledge receipt of a letter under date of November 5, 1937, from Messrs. McDowell & McDowell, attorney for the Board of Revenue of Barbour County, which is as follows:

"The Parent Teachers Association of Clayton, Barbour County, Alabama, have inaugurated a plan to maintain an exhibit of the agricultural resources of Barbour County at a **County-wide agricultural Fair** to be held in the City of Clayton—the county seat of Barbour County—during the week beginning November the 8th next, and to encourage the general agricultural interest of the people of this County, wherein more interest will be taken by our people in the future, than they have manifested in the past.

"To that end the Parent Teachers Association of Clayton have petitioned the Board of Revenue of Barbour County to donate to the said Parent Teachers Association the sum of Fifty Dollars out of monies in the Treasury of the County, not otherwise appropriated for the purposes aforesaid. The Board of Revenue is in sympathy with the movement, and desires to comply with the request of the said Association—if in the opinion of the Attorney General—it can be legally done. As County Attorneys we are directed to request an opinion from you as to the legality. In our opinion the Board of Revenue is permitetd under Subdivision 12 of Section 6755 of the Code of Alabama of 1923 this expenditure for the purposes hereinabove set forth, and we trust that it meets the approval of the Attorney General's office."

I am of the opinion that your inquiry should be answered in the affirmative. Subdivision 12 and 23 of Section 6755, Code of Alabama, 1923, as amended, provide as follows:

"12. To make an appropriation, in no case to exceed seven hundred and fifty dollars per year, to install and maintain an exhibit of the agricultural and mineral resources of their respective counties.

"23. To set aside, appropriate and use county funds or revenue for the purpose of developing, advertising, and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultral, industrial, and manufacturing plants, factories and other industries in their respective counties."

In my judgment, the above statutory provisions are express authority for the appropriation by the county governing body of county funds for such purposes as mentioned in your letter.

I refer you to an opinion of this office rendered on September 8, 1927, to Hon. T. B. White, Clerk, Board of Revenue of Sumter County, which opinion authorizes such an appropration (Biennial Report of Attorney General 1926-28, page 279).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 9, 1937

Hon. S. Baxter, Superintendent,
Houston County Schools,
Dothan, Alabama

Disposition of School Property under deed retaining reversionary interest.

1. School building reverts to original owner when abandoned for school purposes under deed retaining reversionary interest in land.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your letter of June 17, 1937, requesting my opinion as follows:

"I am enclosing a certified copy of the Pleasant Plains school property.

"The Houston County Board of Education has abandoned the above property and as I understand the land will revert back to the original owner or estate. What I would like to know is, will the building on this land belong to the Houston County Board of Education or will it be the property of the owner of the land?"

It is my opinion that under the deed the building on the land described will revert to the original owners, J. S. Gamble and M. S. Gamble.

The deed clearly retains in the grantors of the land a reversionary interest in the land, the reversion being dependent upon the discontinuance of use of the land for school purposes. If the land conveyed should ever cease to be used for school purposes, the grantors have an interest which will vest in them as an estate in fee simple. **Dick vs. Darden et al.** 204 Ala. 400, 85 So. 369.

Under the law of Alabama, the erection of a building upon land "vested it with the character and quality of the realty on which it was placed, and

it became the property of the owner of the soil, in the absence of contractual reservation to the contrary." **Lamont v. Marbury Lumber Company,** 187 Ala. 436, 65 So. 369. I find no reservations to the contrary in the deed, supra, or provisions as to the treatment of buildings to be erected upon the lands in any manner other than as a part of the realty. Therefore, the buildings became a part of the realty and the interest of the grantors in the land attached to the buildings when erected upon the land.

You do not give me any facts as to the condition of the building with respect to whether it was on the land at the time of the deed nor any facts as to the date of the abandonment of the property. In certain similar cases the courts of equity have permitted the removal of such structures, but these cases depend entirely upon the facts. See **Schwing v. McClure,** 120 Ohio 335, 165 N. E. 230, 56 C. J. 477; **New Hebron Consolidated School District v. Sutton, 151 Miss.** 475, 118 So. 303.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 9, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Deputy Solicitors—Local Acts of 1927, page 332, undertaking to provide compensation and fix the duties of the **County Solicitor** of Bullock County is not effective upon the compensation and duties of the **Deputy Solicitor** of said county, appointed pursuant to Section 5522 et seq. of the Code of 1923.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I am advised that the lawyer holding the position of Solicitor for Bullock County is duly appointed, as Solicitor for such County, by the Circuit Solicitor as per Section 5522, Code of 1923.

"The County is only paying $75.00 per month as salary to such Solicitor, as per Local Acts 1927, page 332.

"Please refer to Sections 5522-5524, Code of 1923, and amendments, also Local Acts 1927, page 332 and advise me as follows:

"1. Would the salary of the Solicitor of Bullock County be $900.00 or $1200.00 per year, provided there is no local law creating the position of County Solicitor and such Solicitor is Deputy Solicitor appointed by the Circuit Solicitor under Section 5522, Code of 1923?"

In my opinion, the salary of the **Deputy Solicitor** of Bullock County, appointed by the Circuit Solicitor as provided by Section 5522 of the Code of 1923, is fixed by Section 5523 of the Code of 1923; and that Local Acts 1927, page 332, which purports to fix the compensation of the **County Solicitor** of Bullock County is not effective to change his compensation.

The Supreme Court has often held that there is a distinction between **County Solicitors** and **Deputy Solicitors.**

In **Rowe, Judge of Probate, v. Owen,** 204 Ala. 353, the Court observed:

"It must be observed that the appellee is not what is termed a county solicitor, strictly speaking, but is a deputy solicitor and is charged by law with the performance of various and sundry duties besides prosecuting cases in the county court. * * * Had this defendant been what is termed a 'county solicitor,' strictly speaking, and all of his official acts and duties related exclusively to the county court, the office would no doubt be abolished by the act in question; but he holds no such office, and has many duties to perform which do not belong or pertain to the county court."

See also **State ex rel. Gaston v. Black,** 199 Ala. 32; and **State ex rel. Jones v. Stearns,** 200 Ala. 405.

Inasmuch as the court, prior to the Act of 1927 dealing with the compensation and duties of the **County Solicitor** of Bullock County, had pointed out the distinction between a **County Solicitor** and a **Deputy Solicitor,** it must be assumed that the legislature knew that the term "county solicitor" had been judicially defined, and that it used the term "county solicitor" in said local act advisedly. See Alabama Digest, Vol. 18. Title "Statutes", Key No. 225 3/4.

It is my opinion that the Local Acts of 1927, page 332, is not operative upon the office of Deputy Solicitor of Bullock County as the same is provided for by Sections 5522 et seq. of the Code of 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 10, 1937

Hon. Watkins C. Johnston,
Judge of Macon County Inferior Court,
Tuskegee, Alabama.

Vacancy in the office of Judge of the Inferior Court of Macon County filled by appointment of the Governor under the provisions of Section 158 of the Constitution. The appointee shall hold his office until the next general election for any state officer held at least six months after the vacancy occurs, and until his successor is elected and qualified.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of October 30, 1937, which is as follows:

"By local act there was created an Inferior Court in Macon County, Alabama; in May 1937 the Judge of that Court resigned and I was appointed by Governor Graves to fill that vacancy. Was my appointment for the unexpired term of my successor (predecessor), or was my appointment only for that period of time until the next general election, to-wit: 1938"

In my opinion, the appointment which you received at the hands of Governor Graves was not for the unexpired term of your predecessor but was for that period of time until the next general election for any state officer held at least six months after the vacancy occurred.

In my judgment, even if Act No. 157, approved June 26, 1935, Local Acts, 1935, page 76, was silent as to the manner of filling a vacancy in the judgeship of said Court, Section 158 of the Constitution of 1901 would govern inasmuch as the judgeship of said Inferior Court of Macon County is filled by election.

Section 13 of Act No. 157, supra, however, expressly provides that vacancies in the office of judge of the said Inferior Court shall be filled in the same manner as now provided by law for filling vacancies of judgeships in the Circuit Courts of the state. This to my mind makes Section 158 of the Constitution controlling on the question at hand. Section 158, supra, is as follows:

"Sec. 158. Vancancies in the office of any of the justices of the supreme court or judges who hold office by election, or chancellors of this state, shall be filled by appointment by the Governor. The appointee shall hold his office until the next general election for any state officer held at least six months after the vacancy occurs, and until his successor is elected and qualified; the successor chosen at such election shall hold office for the unexpired term and until his successor is elected and qualified."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 10, 1937

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Commissioners' Court—

1. Hospitalization of indigents in County may be provided for by County Board of Public Welfare, not inconsistent with the rules and regulations of the State Board.

2. Court of County Commissioners may make appropriations for County welfare work, including hospitalization of indigents.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your request of September 25, 1937, as follows:

"We have in the county from time to time indigents who need hospital care and no means of paying for it.

"Will you please advise if the county can pay hospital bills of this nature to a hospital located in the county, the population of county being less than 25,000."

Act No. 332, General Acts 1935, page 762, sets up a system of unified welfare activities and agencies in the State, counties and municipalities. Section 13 of said Act provides in part as follows:

> "All administrative and executive duties and responsibilities of the County Department not inconsistent with the rules and regulations of the State Board shall be performed by the County Director, subject to the approval of the County Board. These duties and responsibilities shall include relief to persons in need of assistance," etc.

The hospitalization of indigents in the County is included in the phrase "relief to persons in need of assistance." The method of working out such hospitalization is within the control of the County Department of Public Welfare, which must not be inconsistent with the rules of the State Board of Public Welfare.

Section 14 of said Act provides for appropriations to be made by the Court of County Commissioners, or other governing body of the county, as follows:

> "The County Board of Revenue, Court of County Commissioners, or other governing body of the County and incorporated municipalities within the county shall make joint appropriations for office space, supplies, and for the maintenance of the functions to be performed by the County Department of the Public Welfare, and shall mutuallly participate in the benefits thereof, but the amount to be appropriated by said governing body of the county and by each municipality shall be subject to approval of the said governing body of the county and the participating municipality or municipalities."

The Court of County Commissioners, or other governing body of the county shall make appropriations for the program of services. And the method of performing the services, including hospitalization of indigents, is a matter for the determination of the County Department of Public Welfare, in cooperation with and not inconsistent with the rules and regulations of the State Department of Public Welfare.

For further information, generally, concerning the status of the County Department of Public Welfare and the Court of County Commissioners with reference to public welfare work, you may see Quarterly Report of the Attorney General, Vol. III, page 97, also Opinion addressed to Dr. J. N. Baker, State Health Officer, on August 14, 1937, and to Hon. M. T. Maxwell, Secretary and Purchasing Agent, Board of Revenue, Tuscaloosa County, on July 2, 1937.

The Court of County Commissioners is not authorized to pay directly to hospitals located in the county, for hospitalization of indigents, independently of the above.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

November 12, 1937

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Funeral Expenses—A charge for the use of a church for funeral ceremonies is a part of the funeral expenses of the deceased. Such charge must bear a reasonable proportion to the condition of the estate.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date in which you inquire if a claim filed in the Probate Court against an estate of a deceased person for the use of a church for funeral ceremonies for the deceased is a part of the deceased's funeral expenses.

In my opinion your question should be answered in the affirmative.

In the case of In re Bauer's Estate, 239 Pac. p. 49, the Supreme Court of California in 1925, said:

"The term 'funeral expenses' has reference to those necessary and, in fact, compulsory expenditures, the necessity for which arises immdiately upon and after the death of the decedent, and which embrace the coffining, embalmment, arraying, and sepulture or cremation of his body, togther **with those accustomed forms and ceremonies which attend upon the present disposition of the remains.** * * *" (Italics supplied).

In the case of McCullough v. McCready, 102 N. Y. Supp. 633, the Court said:

"The term 'funeral,' in the law as to the liability of estates for 'funeral expenses,' includes many circumstances and may cover varied outlays. The term embraces not only the solemnization of interment, **but the ceremonies and accompaniments attending according to the religious faith** and sentiment of the friends of the deceased. * * *" (Italics supplied).

Subdivision 3,Section 314 of the New York Surrogate's Court Act, defined funeral expenses as follows:

"* * * and the expression 'funeral expenses' **include suitable church or other services,** a burial lot and suitable monumental work erected thereon, and a reasonable charge or expenditure for the perpetual care of the decedent's burial lot." (Italics supplied).

The following expenditures have been allowed as a part of the funeral expenses:

Suit of clothes for burial of deceased.

Flowers for grave.

Carriage and automobile hire for funeral.

Burial vault.

Tombstone.

Expenses of wake including cost of cheese, crackers, tobacco and drinks.

Expense for ringing church bell.

Cost of wearing apparel of mourners.
Mourning rings.

Cost of casket, digging and filling grave, pall bearers, use of hearse, automobiles and funeral home.

Not only the solemnization of the interment but also the ceremonies and accompaniments attending the same.—**24 C. J. pp. 308-309, and cases cited thereunder.**

As the costs of the funeral services are a part of the funeral expenses, it is, therefore, my opinion that a charge for the use of a church for said services is a proper part of the funeral expenses. Of course, the funeral expenses must bear reasonable proportion to the condition of the estate of the deceased, and if disproportionate, should be scaled to that standard.—**Wright v. Menefee,** 226 Ala. 55, 145 So. 315; **Phillips v. First National Bank,** 208 Ala. 589, 94 So. 801; **Haldreth v. Curbow,** 59 Ala. 516. The above conclusion is based on the assumption that the use of the church was not given as a gratuity.—**Hewett v. Bronson,** 5 Daly, p. 1, (New York Common Pleas).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 12, 1937

Hon. J. Eugene Foster,
General Counsel,
Unemployment Compensation Commission,
Montgomery, Alabama

Unemployment Compensation Act—

Section 2(f), as amended, in so far as it treats all business enterprises actually having a common majority ownership or control as one employer, for the purpose of the Act, does not unconstitutionally discriminate against either the employees or the employers involved in such business enterprises nor deny them the equal protection of the law.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I have your letter of June 21, 1937, which reads as follows:

"Please give us your opinion on the following questions, based upon the following facts;

"Mr. Harry Maring, of Selma, Alabama, owns four fifths interest in the Southern Clothing and Notions Company which is a partnership, the other partner owning one-fifth interest. Mr. Maring also owns the entire interest in a store at Robertsdale, Alabama known as the M and F Store, and a store by the same name at Foley, Alabama. The Southern

Clothing and Notions Company employs less than seven employees. The M and F Store at Robertsdale employs not more than three persons, and the M and F Store at Foley employs three or less people. The employees of all three stores combined total more than eight. These persons worked in these three stores for more than twenty weeks during the years 1935 and 1936.

"Part of Section 2 (f) of the Alabama Unemployment Compensation Law provides as follows:

" 'Moreover, that where any person, partnership—has a majority control or ownership of otherwise separate business enterprises employing persons in the State, all such enterprises shall be treated as a single employer' for the purposes of this Act.'

"In view of the above facts, and the above excerpt from Section 2 (f) of the Alabama Unemployment Compensation Act we ask your opinion:

"1. Whether or not, under the facts stated, the employees of Southern Clothing and Notions Company would be liable for taxes against employees under the provisions of the law, if constitutional;

"2. If the letter of the law would make these employees liable for the taxes, would not such proviso be unconstitutional as creating undue discrimination against an employee at Foley who would not owe the tax if he was working for a person similarly situated like Mr. Maring;

"3. Whether or not there is an undue discrimination in the law against Mr. Maring's partner in Southern Clothing and Notions Company by reason of the fact that a competing business with less than eight employees with a partner not interested in any outside business would not owe the tax, whereas, if one of the partners is interested in outside business, the Southern Clothing and Notions Company would have to pay the tax, although less than eight employee were employed;

"4. If Mr. Maring only owned 50% of the Southern Clothing and Notions Company, and would thereby be exempt from taxes, is this not a discrimination against a partner in such business where his other partner owns more than fifty percent of the business."

In answer to your first inquiry it is my opinion that the employees of the Southern Clothing and Notions Company are, under the facts stated, liable for taxes against employees levied by the Alabama Unemployment Compensation Act, Act No. 447, General Acts 1935, page 950, as amended by Acts No. 156, No. 194, No. 195, General Acts 1936, pp. 176, 225 and 228. The provision to which you refer, after particularly defining the term "employer", provides:—

"2 (f) * * * provided, moreover, that where any person, partnership, association, corporation, whether domsetic or foreign, or the legal representative, trustee in bankruptcy, receiver, or trustee thereof, or the legal representative of a deceased person, either directly or through a holding company or otherwise, **has a majority control or ownership of otherwise separate business** enterprises employing persons in the state, all such enterprises shall be treated as a single 'employer' for the purposes of this Act. Any employer subject to this Act shall cease to be subject hereto only upon a written application by him after a finding by the commission that he has not within any calendar week within the last completed calendar year employed **eight or more persons** in employment subject hereto. Any employer (of any person within the State) not otherwise subject to this Act shall become fully subject hereto, upon filing by such

employer with the commission of his election to become fully subject hereto for not less than two calendar years, subject to written approval of such election by the commission."

The constitutionality of this Act has been upheld by the Supreme Court of Alabama in the case of **Beeland Wholesale Company v. Kaufman, Chairman, Alabama Unemployment Compensation Commission,** 174 So. 516, and by the Supreme Court of the United Stated in **Albert A. Carmichael et al v. Southern Coal & Coke Company**—L. Ed.

You also inquire if there is a denial of the equal protection of the law to co-employees and the other employer by reason of this definition. I think not.

In upholding the validity of this Act, the Supreme Court of the United States, in the Southern Coal & Coke case, said:

"It is inherent in the exercise of the power to tax that a State be free to select the subject of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a State any rigid rule of equality of taxation. This court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation * * *.

"Like considerations govern exemptions from the operation of a tax imposed on members of a class. A legislature is not bound to tax every member of a class or none. It may make distinction of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. * * *

"Distincitions in degree stated in terms of difference in number, have often been the target of attack, see Booth v. Indiana, 237 U. S. 391. It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competence is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not. * * *"

And with reference to discriminations against employees,

"Special complaint is made of the discrimination against those with only six co-workers as contrasted with those who have more. We have already shown that a distinction in terms of the number of employees is not on its face invalid. * * *"

Touching the many questions urged concerning discriminations against employees, the Supreme Court of Alabama in the Beeland Wholesale Company case, supra, said of the Act:

"We think it is within the State's police power, not limited by Section 13, because the purpose is public, And that there is no arbitrary or capricious or unequal classification either as applied to employers or employees."

The purpose of the legislature in treating all business enterprises actually having a common majority ownership or control as one employer, for the

purposes of that act, would appear obvious. Otherwise, each department of a given business might be so separately incorporated or organized, or groups of machines in factories be so separately incorporated or organized that the purpose of the law be artifically defeated. To control a business is to control its employment policies and activities. The legislature could have so reasoned.

In view of these decisions and considerations, I therefore hold, in answer to your second, third and fourth questions, that the provisions of the Act which treat all business enterprises actually having a common majority ownership or control as one employer, for the purposes of the Act, does not unconstitutionally discriminate against either the employees or the employers involved in such business enterprises nor deny them the equal protection of the law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 12, 1937

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Counties—General Acts 1931, page 687, authorizes Elmore County to make an appropriation for card index system for Board of Education for use in keeping record of report cards.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your letter of September 22, 1937, as follows:

"Kindly advise whether or not the County can legally pay for a card index system for the Board of Education for keeping record of report cards. This record is kept in the office of the Superintendent of Education."

I refer you to opinion to Hon. Lloyd Woodruff, of February 24, 1937, Quarterly Report of the Attorney General, Vol. 6, page 88, which quotes the following from General Acts 1931, page 687:

"The Courts of County Commissioners or Boards of Revenue of the several counties of Alabama are hereby authorized at any meeting of said court in any calendar year to appropriate any part they may deem proper and expedient out of the general funds of the treasury for the support of the public schools in said County."

Under the above, it is my opinion that the Commissioners Court of your County may make an appropriation for a card index system to be used by the Superintendent of Education in keeping the record of report cards used in the public schools of your County and the County may pay said expense when so authorized. This constitutes an appropriation for the support of the public schools in Elmore County and is within the discretion

of the Commissioners Court as to whether or not such an appropriation of the general funds of the treasury is proper and expedient.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 13, 1937

Hon. H. C. Hood,
Register in Chancery,
Oneonta, Alabama.

Register of the Circuit Court not required to keep an office copy of transcript on appeal to the Supreme Court.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of October 22nd, 1937, in which you request my opinion as follows:

"In your recent opinion of October 16, 1937, you held that the Section 6108 does not apply to the Register of the Circuit Court as well as to the Clerk of the Circuit Court and that the Register can not charge Two Dollars and one-half for the office copy.

"If Section 6108 does not apply to the Register of the Circuit Court, is he required by law to make an office copy to be kept on file in his office."

I know of no statute requiring the Register to keep an office copy of the transcript of the record for appeals to the Supreme Court or Court of Appeals.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 15, 1937

Hon. J. A. Carnley,
Probate Judge,
Coffee County,
Enterprise, Alabama.

Licenses—Beauty Parlors—

1. Beauty parlor operator required to procure shop license measured by number of operators or students charging for labor.

2. Shop license covers work done by owner, who need not procure operator's license.

3. Beauty parlor licenses required to show only name of shop and total number of operators or students.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter in which you request my opinion as follows:

" I will thank you to advise me as to what is the proper license to collect from a beauty shop located here that also operates a school in beauty shop work.

"Also, please advise whether the operator of the shop should pay one license to cover the shop and all her assistants including student assistants, or should she take out a shop license and a separate license for each operator or student, and does the shop license cover work done by the owner or must she have an operator's license, and addition to the shop license.

"Also, please state whether or not the license or licenses to be issued should show the name of the shop and the name of each operator or student or should it simply show the name of the shop and the total number of operators or students covered thereby.

"Also, please state whether or not the shop is liable for its license including that of each operator and student, or is each such student or operator personally liable for such license."

In answer to your inquiry whether the operator of a shop should pay one license to cover the beauty shop and all the assistants, including student assistants, or whether a shop license and a separate license for each operator or student should be procured, it is my opinion that the operator of a beauty parlor is required by Schedule 21 of the General Revenue Laws of 1935 (Simon's Compilation, page 225) to procure a license for her shop, which said license will be in the amount of ten dollars ($10.00), and that for each operator in such shop there shall be added to the amount of ten dollars either six dollars ($6.00) or four dollars ($4.00), depending upon the size of the city in which the beauty parlor is located. This conclusion is based upon the fact that the license imposed by Schedule 21 is a privilege license for operating the business of a beauty parlor and is measured by the number of operators employed in hairdressing, facial treatments, manicuring, hairwaving, etc. in such beauty parlor.

You do not state in your letter whether or not the students in the beauty shop described by you "engage in beauty parlor work for which a charge is made or material used is charged therefor." Schedule 21 provides as follows:

"SCHEDULE 21. Each person operating what is generally known as a BEAUTY PARLOR, or other place where hair dressing, facial treatments, manicuring, or hair waving is done shall pay a license of ten dollars ($10.00) and for each operator so employed as follows:

"In cities of more than 60,000 inhabitants ..... $6.00
In cities of less than 60,000 inhabitants and all other places whether incorporated or not ..... 4.00

"This schedule of fees shall apply to beauty parlor colleges where said colleges engage in beauty parlor work for which a charge is made or material used is charged therefor."

If the students, under the facts detailed by you, "engage in beauty parlor work for which a charge is made or material used is charged therefor", then the party operating the beauty parlor should procure a license measured by the number of students so operating in said shop, as above described. How-

ever, if no charge is made by the students or the operator either for the work or for the material used, then the license required of such beauty parlor owner would be only the ten dollars mentioned in Schedule 21, plus the amount charged for each non-student operator.

In answer to your inquiry whether or not the shop license covers work done by the owner, I wish to advise you that it is my opinion that Schedule 21 unmistakably allows the owner of the beauty parlor to engage in hair dressing, facial treatments, manicuring, etc., upon the payment of the shop license of ten dollars. There is no requirement for an additional license for such owner.

Inasmuch as it has been held hereinabove that the license imposed by Schedule 21 is upon the **business** of operating a beauty shop, measured by the number of operators, it is my opinion that the license issued should show the name of the shop and the total number of operators or students, there being no necessity for showing the name of each student or operator.

For the same reason, that is, that the license is a **business** license, the owner or operator of the shop and not the students or operators working therein is required to procure the license.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 15, 1937

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

Counties—Payment of office rent for Resettlement Administration.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your request as follows:

"I shall thank you to please advise me whether Butler County can pay, either from the General Fund or from the Sales Tax Fund, rent on an office used by Resettlement Administration."

I call your attention to opinions addressed to Hon. B. L. Malone, Biennial Reports, 1932-34, page 595, and to Hon. W. H. Lindsay, Biennial Reports, 1932-1934, page 629, which treat subjects similar to the one involved in your request. In line with said opinions, your request must be answered in the affirmative, since the office rent, about which you inquire, is of the same nature as that in the opinions above cited. It is my opinion that said rent may be paid from the General Fund, or the Sales Tax Fund, if the work is in cooperation with one of the agencies mentioned in Section 21 of the Alabama Sales Tax Act. The latter matter was fully discussed in opinion to Dr. J. N. Baker, State Health Officer, under date of August 14, 1937, Book 17-A, page 166.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

November 15, 1937

Hon. R. L. Almon,
County Solicitor,
Lawrence County,
Moulton, Alabama.

Intoxicating Liquors—Suspension of Sentence—

1. The various Judges of the Courts trying violations of the prohibition law must, on the second and subsequent convictions, under Section 4621 of the Code of Alabama, 1923, impose hard labor punishment, provided the fact of prior conviction is properly pleaded as provided in Section 4644 of the Code of Alabama, 1923, and is proven.

2. Judges of the various Courts of Alabama have no authority to suspend sentences imposed in accordance with the provisions of that portion of Section 4622 which makes it mandatory upon the Court to impose hard labor punishment for second, and all subsequent, convictions.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter in which you request my opinion as follows:

"1. Does a trial judge having jurisdiction to try cases for a violation of the prohibition laws have the authority to impose only a fine for the second conviction?

"2. In the event you hold that he does not have such authority, does such judge have the authority after he imposes the hard labor sentence, to suspend such hard labor sentence during good behavior or otherwise prevent the execution of that penalty?"

Answering your first inquiry, your attention is called to Section 4644 of the Code of Alabama, 1923, which provides, among other things, as follows:

"* * * and in any prosecution for a second or subsequent offense it shall not be requisite to set forth in the indictment, information, complaint or affidavit, the record of the former conviction, but it shall be sufficient briefly to allege such conviction, * * *"

Also, your attention is called to that portion of Section 4622 of the Code of Alabama, 1923, providing for sentences in cases of second or subsequent convictions for violations of Section 4621 of the 1923 Code, as follows:

"* * * and, on second conviction of a violation of said Code Section 4621, the offense shall, in addition to a fine within the limits above named, be punishable by confinement at hard labor for the county for not less than three months nor more than six months to be imposed by the court or judge trying the case; and on the third and every subsequent conviction of a violation of said Code Section 4621, the offense shall, in addition to a fine within the limits above named, be punishable by confinement at hard labor for the county for not less than six months nor more than twelve months."

From the above quotations, it will be seen that, in the case of second or subsequent convictions for violation of the provisions of Section 4621, it is made mandatory upon the Judge trying the case to impose hard labor

punishment. The punishment to be imposed, in case of second conviction, is a sentence to confinement at hard labor for the county for not less than three months nor more than six months; and the punishment to be imposed, in the case of third and every subsequent conviction, is a sentence to confinement at hard labor for the county for not less than six months nor more than twelve months. However, unless the prior conviction or convictions, under the terms of Section 4621, are properly pleaded and proven, in accordance with the terms of said Section 4644, then, there would be no occasion for the application of the above quoted portion of Section 4622, and it would not be mandatory upon the court to impose hard labor punishment.

In view of the above, it is my opinion that a trial judge having jurisdiction to try cases for violation of the prohibition laws would be required to impose only a fine for second or subsequent convictions, provided such second or subsequent convictions were not properly pleaded and proven. Of course, the Judge might, in his discretion, impose additional hard labor. But, in case such second or subsequent convictions were properly pleaded and proven, then such judge would not be authorized to impose, as a punishment only a fine as, in such case, the imposition of hard labor punishment would be madatory upon him.

As to the necessity for pleading and proving second or subsequent convictions, to make the terms of Section 4622, relative thereto, applicable you are referred to the following cases:

Ex Parte State Ex Rel. Davis Atty. Gen. Brown vs. State, 90 So. 278 (second case) Hill vs. State, 167 So. 606.

Your second inquiry must be answered in the negative. Your attention is called to Section 4625 of the Code of Alabama, 1923, as follows:

"Suspension of sentence for violating prohibition laws regulated.—No judge of any court shall have authority to suspend sentence in whole or in part upon the conviction of any person or persons in his court of any offense against the laws of the State of Alabama for the promotion of temperance or for the suppression of the evils of intemperance, except in cases authorized and prescribed by existing laws. It shall be the duty of such judge, upon the conviction of any such offense of any person or persons, to pronounce and have enforced and executed the sentence of the law due to a convicted person in such cases. Any action upon the part of a trial judge of any court for the purpose of preventing or delaying the execution of the penalty of the law, by suspending sentence or withholding sentence for the purpose of preventing its execution, shall be null and void and constitute a high misdemeanor in office."

It is true that, at the time of the enactment of the law which is now Section 4625, there existed another Section, namely, Section 5284 of the Code of Alabama, 1923, which is as follows:

"Punishment by imprisonment in county jail or at hard labor for county, sentence for suspended or remitted.—When the Court imposes additional punishment where a fine has been assessed by a jury, or in any case where the court is authorized to impose such punishment at imprisonment in the county jail or at hard labor for the county, the court may, in its discretion, suspend the execution of such sentence until a subsequent term of the court and may then order it to be executed or remit the same, or further suspend the execution of the sentence."

This last quoted section has been considered by the Court of Appeals of Alabama, and by the Supreme Court of Alabama on Certiorari, on the question of its constitutionality; and the same was held to be constitutional **Barnett v. State,** 18 Ala. App. 246, 90 So. 13, Cert. den., 206 Ala. 698, 90 So. 925; **Clark v. State,** 20 Ala. App. 472, 102 So. 916.

I have taken into consideration the case of **Montgomery v. State,** 231 Ala. 1, 163 So. 365, Cert. Den., 231 Ala. 41, 163 So. 377, in which the Supreme Court, upon certified questions submitted to it by the Court of Appeals of Alabama, held unconstitutional the Act of 1932, Extra Session, p. 54, authorizing the trial courts to suspend sentences in certain cases as being in violation of Sections 43 and 124 of the Constitution of Alabama of 1901. This case involved an Act whose provisions were more extensive than the provisions of Section 5284, Code, above quoted.

The effect of Section 5284, supra, is to authorize the trial judge or court to impose additional punishment conditionally, that is to say, to authorize the inclusion of the additional punishment in the judgment, but to let the matter remain in fieri until a subsequent term at which time the judge or court may finally determine whether or not such additional punishment shall be imposed. The decision in the Montgomery cases, supra, does not purport to hold that the legislature constitutionally may not invest the courts with such authority.

However, Section 4622 of the Code expressly makes the hard labor provided therein a mandatory part of the punishment to be imposed. It is in no sense "additional punishment" which may or may not be imposed by the court or judge at his discretion. Section 4625 does not apply to such mandatory hard labor sentence.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 16, 1937

Hon. D. E. Dunn,
Assistant Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. Possession of stamped and/or identified alcoholic beverages, other than malt or brewed beverages, i. e., alcoholic beverages, other than malt or brewed beverages, purchased in accordance with the provisions of the Alabama Beverage Control Act, in a cafe, filling station or night club in a wet county, which said cafe, filling station or night club does not have a license to sell any alcoholic beverages, other than malt or brewed beverages, is prima facie evidence that the same are possessed for sale or distribution with the intent to sell or distribute the same contrary to law.

2. Agents of the Alabama Alcoholic Beverage Control Board or other duly authorized officers are legally justified in seizing such alcoholic beverage referred to in Sub-section 1, when possessed in the manner there detailed, in a wet county, and arresting the proprietor of such a place on a charge of selling, offering to sell

or illegally having in possession, alcoholic beverages contrary to law.

3. In such a case, if there is no conviction, the alcoholic beverages so seized should be returned to the person from whom they are seized and the officer seizing the same would incur no liability on his official bond.

4. Likewise, if there is a conviction, the alcoholic beverages so seized should be disposed of in accordance with the appropriate provisions of Article 11, Section 167, Code of Alabama, 1923.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 4, 1937, which follows:

"I have before me a copy of your opinion addressed to Hon. J. Sam Cleiland, Sheriff of Clarke County, on July 29, 1937.

"Throughout this opinion reference is made to Clarke County which of course is a dry county, but we have a similar situation which has arisen in a wet county. In several wet counties there are filling stations, cafes and night clubs, none of which have a license to sell any alcoholic beverage other than beer, and none of which is used exclusively as a dwelling house. However, at these places there is kept, and I have reason to believe sold, although I may not be able to prove the sale, alcoholic beverages other than beer.

"1. Is the possession of wine or whiskey under the above circumstances prima facie evidence of a sale or keeping for sale of said wine or whiskey by a person not licensed to sell any alcoholic beverage other than beer?

"2. On the above facts, would the agents of the Alabama Alcoholic Beverage Control Board or other officers, be legally justified in seizing such wine or whiskey and arresting the proprietor of such a place of business on the charge of selling, offering for sale or illegally having in possession, prohibited liquors and beverages contrary to law?

"3. If there is no conviction, should such wine or whiskey be returned to the owner and in that event, would the agent or officer seizing same, be free from liability on his official bond?

"4. Upon conviction, what disposition should be made of the wine or whiskey so seized?"

As you know, the possession of unstamped and/or unidentified alcoholic beverages, i. e., alcoholic beverages not purchased in accordance with the provisions of the Alabama Beverage Control Act, is illegal anywhere in the State of Alabama, in either a wet or dry county. See opinion of the Attorney General to Hon. E. Dick Burrows, Sheriff, Walker County, Jasper, Alabama, under date of April 3, 1937, and the provisions of Sections 51 and 61 of the Alabama Beverage Control Act, cited and quoted in the last part thereof.

Therefore, I presume from your letter of inquiry that the question you propound therein concern stamped and/or identified alcoholic beverages, other than malt or brewed beverages, i. e., alcoholic beverages, other than malt or brewed beverages, purchased in accordance with the provisions of

the Alabama Beverage Control Act. Upon such an assumption, I shall deal with your questions in seriatim.

1. You first asked whether the possession of alcoholic beverages, other than malt or brewed beverages, in a filling station, cafe or night club, which does not have a license to sell any alcoholic beverages, other than malt or brewed beverages, in a wet county, is prima facie evidence of the sale or keeping for sale, or illegally having in possession, such alcoholic beverages contrary to law.

In my opinion, your question should be answered in the affirmative.

In the opinion of this office to Hon. Festus M. Shamblin, Sheriff, Tuscaloosa County, Tuscaloosa, Alabama, under date of May 29, 1937, which opinion is cited and quoted from in the opinion to Sheriff Cleiland, to which you refer in your letter of inquiry, this office held as follows:

"Section 4685, Code of 1923, to which you refer reads as follows:

" 'Section 4685. Keeping of liquors prima facie evidence.—The keeping of liquors or beverages that are prohibited by the law of the state to be manufactured, sold or otherwise disposed of, in any building not used exclusively for a dwelling shall be prima facie evidence that they are kept for sale, or with intent to sell the same, contrary to law.'

"I am of the opinion that the keeping of legally purchased alcoholic beverages of any kind in an eating establishment or cafe would amount to prima facie evidence that same were kept for sale or distribution, or with the intent that they be sold or distributed contrary to law. The Legislature in Section 4685 has declared a rule of evidence, which it had power to do. **Fitzpatrick vs. State,** 169 Ala. 1, 53 So. 1031. I find nothing in the Alabama Beverage Control Act which repeals this provision in dry counties."

Just as there is nothing in the Alabama Beverage Control Act which repeals Section 4685, supra, in dry counties, there is nothing in said Act which repeals said section in a wet county, insofar as the provisions thereof apply to the keeping of alcoholic beverages, other than malt or brewed beverages, in a filling station, cafe or night club which does not have a license to sell any alcoholic beverages, other than malt or brewed beverages. Since the Alabama Beverage Control Act only repeals the provisions of the old prohibition laws of this State, of which Section 4685, supra, is a part, to the extent of the conflict, the keeping of stamped and/or identified alcoholic beverages, other than malt or brewed beverages, i. e., alcoholic beverages purchased in accordance with the provisions of the Alabama Beverage Control Act, in a filling station, cafe or night club in a wet county which does not have a license to sell any alcoholic beverages, other than malt or brewed beverages, is prima facie evidence that the same are there possessed for the purpose of sale or distribution with the intent to sell or distribute the same contrary to law.

2-3. Your second question is whether or not the agents of the Alabama Alcoholic Beverage Control Board or other duly authorized officers would be legally justified in seizing such alcoholic beverages, so possessed, and arresting the proprietor of such a place of business on the charge of selling, offering for sale or illegally having in possession alcoholic beverages contrary to law.

Your third question is whether or not, in such a case, in the event there is no conviction, the alcoholic beverages so seized should be returned to the owner, and whether or not the officer seizing the same would be

without liability on his official bond. These two questions will be here answered together.

In the opinion to Sheriff Cleiland, which dealt with similar questions in dry counties, I quoted as follows from the opinion to Sheriff Shamblin, supra:

> "I am further of the opinion that the sheriff has authority to seize such alcoholic beverages in a dry county, under the above circumstances, and that he would not be liable to the owner of such alcoholic beverages so seized. Of course, the question of whether or not such alcohlic beverages in a dry county were possessed for the purpose of sale or distribution contrary to law is a question of fact for the court or jury, to be determined by all the attendant circumstances.
>
> "If upon a trial of the issues the court or jury, as the case may be, should decide in favor of the defendant, such finding amounting to a legal determination by them that said alcoholic beverages were not possessed for sale or distribution contrary to law, then the possession of same would be legal and the beverages should be returned by the officers to the person or persons from whom seized."

In accordance with the holding hereinabove announced in answer to your first inquiry, these same principles of law laid down in the opinion to Sheriff Shamblin, in regard to a dry county, are equally applicable to possession of such alcoholic beverages, other than malt or brewed beverages, in a filling station, cafe or night club in a wet county which does not have a license to sell any alcoholic beverages, other than malt or brewed beverages.

Therefore, the agents of the Alabama Alcoholic Beverage Control Board or other duly authorized officers will be legally justified in seizing such alcoholic beverages so possessed in a wet county and in arresting the proprietor of such a place of business on the charge of selling, offering for sale or illegally having in possession such alcoholic beverages contrary to law. If there is no conviction, the alcoholic beverages so seized should be returned to the person from whom they were seized and, in that event, the officer seizing the same would be free from liability on his official bond.

4. Your fourth question is as to what procedure should be followed, in such a case, if there is a conviction, in disposing of the alcoholic beverages so seized. In answer to this question, I adopt the language used in the opinion to Sheriff Cleiland in answer to the same question in regard to a similar situation in a dry county:

> "In such a case, if the person from whom the beverages are seized is convicted, this conviction amounts to a legal determination that the alcoholic beverages found in his possession and seized from him, though legally purchased, were being illegally possessed for sale or distribution or illegally sold. After such a legal determination, you should proceed to condemn and destroy such alcoholic beverages in accordance with the provisions of the appropriate sections of Article 11 of Chapter 167 of the Code of Alabama, 1923. See opinion of the Attorney General to Hon. D. E. Dunn, Assistant Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of July 29, 1937."

As stated in the opinion to you under date of July 29, 1937, the procedure in regard to the condemnation of such alcoholic beverages is the

same in either a wet or a dry county in the State, the sections of the old prohibition laws not having been repealed in this respect by the provisions of the Alabama Beverage Control Act in either a wet or a dry county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 16, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Intoxicating liquors—Sections 4780-4782, Code of Alabama, 1923.

1. Forfeiture of forthcoming bond—Succeeding Sheriff is lawfully authorized to forfeit forthcoming bond.

2. Execution for costs—Register in chancery of jurisdiction in which decree of condemnation was rendered must issue execution against defendant for costs recovered.

3. Execution on forfeited bond—Register in chancery in whose jurisdiction vehicle was condemned must issue execution against defaulting principal and sureties for value of vehicle.

4. Advertising and storage expenses preferred claims—Lawful expenses incurred for storage of contraband vehicle, and for advertising the sale thereof, are preferred claims.

5. Liability of sheriff for costs—Sheriff who has unlawfully released contraband vehicle is not liable for costs of preceedings to condemn such vehicle.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"I herewith respectfully ask that an opinion be rendered relative to the following:

"Condemnation proceedings under Sec. 13, General Acts 1919, where an automobile is sought condemned results in the filing of a valid Replevin Bond with the Sheriff, who, upon approving same, releases the car. Subsequent condemnation hearing by a Circuit Judge results in a declaration of forfeiture and orders the car to be sold according to law by the Sheriff and proceeds distributed according to law. Sureties did not produce the car at time of sale and the then Sheriff did not declare the bond forfeited.

"1. Can a succeeding Sheriff not declare such bond forfeited?

"2. If answer to the above is in the affimative, may a Register in Chancery (in whose Court the condemnation proceedings were instituted and decree rendered) issue execution for costs in the case?

"3. If the face amount of such forthcoming bond indicates a value in excess of costs in the case, must he issue execution for the value of the property?

"A condemned car is ordered by the Court to be sold by the Sheriff. The costs of the proceedings, exclusive of advertising and storage is in excess of the amount realized through sale. The Sheriff satisfies the storage and advertising in full out of the proceeds of sale.

"4. Is the advertising bill a preferred claim, payable in whole out of the proceeds of sale?

"5. Is the storage bill a preferred claim, payable in whole out of the proceeds of sale?

Sheriff 'A' seizes a car and causes same to be stored. Solicitor institutes condemnation proceedings. Sheriff 'B' takes office before decree is rendered ordering car sold by the Sheriff. Sale is not made by Sheriff 'B' who reports to the Register that the car did not come into his possession.

"6. Under such condition, is Sheriff 'A' liable for costs of the case?

"A seized car, condemned and ordered sold, was released by Sheriff prior to decree upon order of the Solicitor.

"7. Is the Sheriff liable for the unpaid costs in the case?"

It is my opinion that a succeeding sheriff is lawfully authorized to forfeit a forthcoming bond accepted by his predecessor in office for a vehicle which was seized while transporting unlawful liquors or beverages. Section 10189, Code of Alabama, 1923, makes it the duty of a sheriff, "To execute and return the process and orders of the courts of record of this state, and of officers of competent authority, with due diligence, when delivered to him for that purpose, according to law." Such services are pertinent to the office of sheriff and are not personal. Therefore, it is incumbent upon the sheriff to return the bond forfeited even though it was accepted by his predecessor in office.

It is further my opinion that the register in chancery of the jurisdiction in which the suit for condemnation was instituted is lawfully authorized and compelled to issue execution for costs against the unsuccessful defendant in proceedings to condemn a vehicle for transporting unlawful liquors or beverages. Section 7221, Code of Alabama, 1923, provides that, "The successful party in all civil actions is entitled to full costs for which judgment must be rendered, unless in cases otherwise directed by law, or by the judgment of the court." This section further provides that, "The Court may apportion the costs at his discretion as justice and equity may require; and this provision is applicable in all cases in which the state is a party plaintiff in civil actions as in cases of individual suitors." In the absence of a decree of the court taxing part of the costs against the State, execution must issue against the unsuccessful defendant for all the costs incurred in said condemnation proceedings.

Answering question number three in your letter, it is my opinion that execution should issue for the value of the car irrespective of the costs. I refer you to Section 4780, Code of Alabama, 1923, which provides that, "Upon the failure of the defendant or claimant to deliver the property condemned within fifteen days after judgment of condemnation the bond (forthcoming bond accepted by the officer authorized to do so) shall be

returned forfeited to the register of the circuit court and execution may issue thereon against the principal and his sureties for the amount of the value of such property * * *." The forthcoming bond which is prescribed by Section 4780, supra, and authorized to be accepted by the sheriff in lieu of the property, contains no liability on the part of the sureties for costs. The sureties are bound only by the terms of the bond and are not liable for costs. Therefore, execution against the bondsmen should issue for the lawful value of the car without regard to costs.

Referring to questions four and five of your letter, it is my opinion that the lawful storage and advertising expense for the storage and sale respectively of a contraband vehicle are preferred claims. Section 4782, Code of Alabama, 1923. No lawful duty devolves upon anyone to store a contraband vehicle or to advertise the same for sale without pay therefor. Such duty does devolve upon court officials even though there is no money to pay the fees prescribed by law for services rendered. It is the duty of the sheriff and of the register in chancery to perform official services in connection with proceedings to condemn an automobile even though there would be no fees available. Therefore, I conclude that the expense of storage and advertising should first be paid, and that such was the intent of the Legislature who were cognizant of the duties to which reference has been made hereinabove.

Referring to questions six and seven of your inquiry it is my conclusion that the sheriff, which you mention, is not liable for costs. The vehicle which he has unlawfully released, if such were the facts, may or may not have been worth the amount of the costs, and consequently the unlawful release thereof by the sheriff may or may not have caused damages to the extent of the costs. Therefore, the costs cannot be taken as a criterion of liability on the part of the sheriff for the unlawful release of the contraband vehicle. Costs are required to be paid from the proceeds of the sale of the condemned vehicle.—Section 4782, supra.

The above is not to be construed as holding that the sheriff, in such a case, when he has unlawfully released a vehicle, is without liability therefor, but is to be construed only as holding that the amount of the costs incurred in the proceedings for the condemnation thereof is not the criterion for determining his liability.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

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November 19, 1937.

Dr. J. N. Baker,
State Health Officer,
Capitol,
Montgomery, Alabama.

Dear Sir:

I beg to acknowledge receipt of your letter of November 16, 1937, as follows:

"On November 2nd you expressed opinion, in answer to inquiry made by me as State Health Officer, that payment by the Comptroller during the fiscal year ending September 30, 1937 of only 65% of the appropri-

ation to the Health Department for carrying on non-essential functions of government does not bar said department from receiving full payment of such appropriation, if at the end of the fiscal year the Comptroller discovers there is available revenue in the General Fund for the full payment of such appropriation.

"It has come to me by word of mouth that, despite this opinion, the Comptroller does not feel he has authority to release the amount unpaid; namely, 35%; and apparently is resting the case on Section 22 of the Budget and Financial Control Act, which is in part as follows: 'All unencumbered balances of administration, operation and maintenance appropriations shall revert to the State Treasury at the end of each fiscal year of a given quadrennium....'"

"The following views regarding the matter are held by me:

"1. It was the intent of the Legislature that the State Department of Health should have $430,000 in the fiscal year 1936-37, the treasury permitting:

"2. Estimate of 65% return on the proratable portion of the above appropriation was an arbitrary one on the part of the Comptroller, and proved to be too low since there was a sufficient amount in the General Fund of the State Treasury at the close of business on September 30, 1937, to have permitted the appropriation to have been paid in full;

"3. Question of unencumbered balance should not enter since it was the intent of the Legislature that the appropriation should be paid in full, the treasury permitting.

"Does not legislative action in allotting the State Department of Health $430,000 in the fiscal year ending September 30, 1937, take precedence over an arbitrary estimate of the Comptroller, since there was in the State Treasury as of September 30, 1937, sufficient funds to meet the appropriation in full; and is not the State Department of Health entitled to the unpaid portion without regard to encumbered balances?"

You ask whether an Act of the Legislature supersedes or takes precedence over an estimate of the Comptroller. Your question is rather involved and I prefer to break it up. In your question you state as a fact that there was in the General Fund of the State Treasury on September 30, 1937, a sufficient amount of money to pay in full the appropriation made to the Health Department for the fiscal year ending September 30, 1937. You also state in your question that the amount of money you received during the fiscal year ending September 30, 1937, was based on an estimate by the Comptroller of the amount the Comptroller would be able to pay your Department. You then inquire whether or not the estimate of the Comptroller is binding on your Department, provided at the end of the fiscal year there appears sufficient revenue to pay your entire appropriation.

In my judgment, it was not the intention of the Legislature that the Budget Act should have a field of operation at all in a year where there is ample revenue with which to pay in full all appropriations made by the Legislature. In situations where there is not a sufficient amount of revenue to pay all appropriations, a number of very complex situations arise. But you state in your letter that no such situation exists and that at the end of the fiscal year there was a sufficient amount of revenue in the General Fund to pay all appropriations in full.

It was not the intention of the Legislature that the Comptroller should be vested with the discretion in the matter of paying appropriations made

by the Legislature. If the revenue is available, the Comptroller must do his part toward seeing that all appropriations are paid. If a sufficient amount of revenue is not available during any fiscal year to pay all appropriations, for both essential and non-essential functions of government, then and in that event the Legislature has provided certain very definite rules to be followed by the Comptroller in ascertaining what appropriations he must pay and what appropriations he must not pay. Estimates by the Comptroller of available revenue is perfectly proper under the law, but these estimates are only estimates and power has not been vested in the Comptroller to enforce an estimate to the exclusion of the Acts of the Legislature. Estimates by the Comptroller are most useful, and, in fact, necessary, but if at the end of the fiscal year it appears that there is a sufficient amount of revenue to pay all appropriations, then the Comptroller is without authority in law to stick to his estimate, but is bound under the law to pay the balance of the appropriation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 20, 1937

Hon. Henry S. Long, Chairman,
State Tax Commission,
CAPITOL.

License and taxation—Person, firm or corporation engaged in discounting or buying conditional sales contracts etc., employing capital of $500,000 or more within the State, with offices in more than one county, must pay maximum State license and county license in county in which principal office is located, and thereupon may engage in business in any county in the State without further license. (Schedule 93½, Section 348, Revenue Act of 1935).

Opinion by Assistant Attorney General Rowe.

Attention Mr. Simon:

Dear Sir:

I have your letter of October 4, 1937, requesting my opinion as follows:

"The question has arisen as to what is the proper license levied against a person engaged in discounting conditional sales contracts in this State under the following facts:

"1. The General Motors Acceptance Company maintains its present office in Birmingham; they also maintain a branch office in Montgomery; the capital employed by them doing such business throughout the State, part of which is handled in the Birmingham office and part of which is handled through the Montgomery office, is over $500,000. Does the payment in Jefferson County of the maximum license levied by this schedule of $300.00 to the State and $150.00 to the County permit them under that license to maintain offices in both cities in this State?

"2. Would a person maintaining two offices, (one in Jefferson County and one in Montgomery County) doing a business of $200,000 in Jefferson County and $100,000 in Montgomery County be required to procure a license in Jefferson County based on capital employed of

$200,000, and an additional license in Montgomery County based on capital employed of $100,000?

"3. Would a person who maintains three or more offices in Alabama, employing a total capital of $14,000.00 be required to procure a license for each office?"

With reference to the inquiry contained in paragraph one of your letter, I am of the opinion that the same should be answered in the affirmative.

Schedule 93½.1, as the same appears in General Acts of the Legislature of Alabama, Regular Session of 1935, page 476, after making provision for determining the amount of license tax to be paid by the tax payer dependent upon the amount of capital employed by the tax payer in the conduct of his business, provides as follows:

"the payment of which shall be sufficient to engage in business in any county of the State except County in which principal office is located in which case County License shall be one-half of above schedule."

From the language of the above quoted portion of said schedule 93½.1, in my opinion, any person, firm or corporation engaged in the business for which license tax is therein provided, would have the right to select the county of the location of its principal office; and, when this selection has been made, and State and County license taxes have been paid, in the county of its selection for its principal office, upon the total capital employed in the conduct of all of its business in the State, then, that would be sufficient as a permit to engage in such business in any County of the State, And, even though such person, firm or corporation may maintain a branch office in each of the other Counties of the State in which they may engage in such business, yet, no further State or County license tax would be due.

With reference to the inquiry made in paragraph two of your letter, in my opinion, a person maintaining two offices, one office in each of two Counties of the State, employing capital in the amount of $200,000 in the business in one of the Counties, and capital in the amount of $100,000 in the other County, would have only to select the County in which it maintains its principal office, and pay State and County license tax, in the County of its selection, based upon capital employed in the conduct of said business in said two Counties in the aggregate amount of $300,000.

With reference to the inquiry made in paragraph three of your letter, it is fully answered hereinabove to the effect that license tax is required to be paid only in the County of the State in which the party engaging in such business maintains its principal office, irrespective of the number of Counties in which offices may be maintained.

Attention is called to the law relating to the construction of statutes imposing license taxes to the effect, that they should be strictly construed against the State or taxing power; and, that they must be confined to strict letter of their language and their application cannot be enlarged by implication or inference; and, that it must show plain intent to include particular license within its terms. **State v. Dr. Pepper Bottling Company,** 155 So. 92, 26 Ala. App. 125, Cert. den. 155 So. 93, 228 Ala. 607.

To the extent that the former opinion of the office appearing in Quarterly Report of the Attorney General, Volume I, page 125 conflicts with the conclusions herein announced, the same is modified hereby.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

November 24, 1937

Hon. D. M. Maxwell, Jr.,
Treasurer of Monroe County,
Monroeville, Alabama.

Monroe County—

1. County Treasurer held not to have legal authority to pay out funds in the county treasury as salary to the purchasing agent of said county.

2. County Treasurer held to have legal authority to pay, from the Gasoline Tax Fund received by said county from the State, salary of clerical help employed in the office of the Superintendent of County Roads and Bridges.

3. County Treasurer held to have legal authority to pay, from Gasoline Tax Fund received by said county from the State, salary of the county road foremen, but not the salary of the Superintendent of County Roads and Bridges.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 21, 1937, as follows:

"Will you please give me your legal opinion on the following questions:

1st.—Is it legal for me to pay out of any funds in the County Treasury, salary to the Purchasing Agent of the County?

2nd.—Can I pay from the Gasoline Tax Fund that is received from the State, clerical help that is employed in the office of the Superintendent of County Roads and Bridges?

3rd.—Can I pay from the Gasoline Tax Fund, salaries of the County and County District Road and Bridge Supervisors?"

In answer to your first question, I advise you that you, as County Treasurer, are without legal authority to pay from the funds in the County Treasury the salary of the purchasing agent of Monroe County. This office, in an opinion rendered to Hon. W. E. Merrell, President, Board of Revenue, Shelby County, Columbiana, Alabama, under date of December 7, 1932, held that a Commissioners Court, Board of Revenue or like governing body is without authority to appoint a purchasing agent for the county. A copy of this opinion is enclosed herewith for your information. Therefore, the Commissioners Court, Board of Revenue or like governing body is without authority, under the general law, to appoint a purchasing agent for the county, the general laws of the State not having been changed in this respect since the date of the opinion, supra. I have made a careful examintion of the Local Acts pertaining to your county and I find no authority contained in said Acts for the appointment by your Board of Revenue, which is the governing body of your county, of a purchasing agent for the county. Since there is no authority of law for the appointment by your county governing body or a purchasing agent for the county, it necessarily follows that you, as County Treasurer, do not have the legal authority to pay out of any funds in the County Treasury the salary of the purchasing agent for the county.

Your second question must be answered in the affirmative, i. e., you, as County Treasurer, do have the legal authority to pay from the Gasoline Tax Fund that is received by the county from the State the salary of clerical help that is employed in the office of the Superintendent of County Roads and Bridges. The Board of Revenue of your county was established by Act No. 548, Local Acts 1915, page 394, approved September 24, 1915. Three later Acts materially changing the law governing the Board of Revenue were passed in the 1923 and 1927 sessions of the Legislature. The 1923 Acts are Act No. 115, Local Acts 1923, page 38, approved August 1, 1923, and Act No. 116, Local Acts 1923, page 42, approved August 1, 1923, and the 1927 Act is Act No. 274, Local Acts 1927, page 191, approved August 11, 1927. The pertinent law which governs the answers to your inquiry is contained in Section 1 of the 1927 Act, supra, which amends Section 5 of Act No. 115 of the 1923 Legislature, supra. By Section 1 of the 1927 Act, Section 5 of the 1923 Act was amended to read as follows:

> "Section 5. The Board of Revenue shall appoint a superintendent of public roads for Monroe County, whose salary shall be fixed by such board but such salary and expense account combined shall not exceed $300.00 per month, and shall be paid out of the road and bridge fund or the general fund. Any vacancy shall be filled by appointment of such board of revenue. Said superintendent shall have general supervision of the road and bridge work of the county under direction of the board of revenue. He shall have authority to employ such foreman and other workers as he may deem necessary for the proper prosecution of the work of maintenance and construction of roads and bridges, may issue to foremen commissions of authority, and they shall be authorized to work persons subject to road duty on the public roads and bridges of the County. The superintendent shall endeavor to so plan and prosecute the work as to keep it going in each board of revenue district in the County, and shall advise with the Probate Judge and the members of the Board of Revenue from time to time to the end that the policies of the Board of Revenue may be understood and carried out."

It will be noted from a reading of the above quoted provisions that the Superintendent of County Roads and Bridges has the authority to employ such foreman and **other workers** as he may deem necessary for the proper prosecution of the work of maintenance and construction of roads and bridges. If the Superintendent of County Roads and Bridges, pursuant to that authority, has deemed it advisable and necessary for the proper prosecution of the work of maintenance and construction of roads and bridges in the county to employ clerical help in his office, then you, as County Treasurer, have the legal authority to pay the salary of such clerical help out of the Gasoline Tax Fund that is received by Monroe County from the State of Alabama, the said tax having been levied by the State and apportioned to the various counties of the State for the construction, maintenance, supervision and repair of roads and bridges in said counties.

In answer to your third inquiry, I advise that you, as County Treasurer, have the legal authority to pay from the Gasoline Tax Fund that is received by your county from the State the salary of the road foremen that are employed by the Superintendent of County Roads and Bridges, pursuant to the authority vested in him by Section 5, supra, this, for the same reasons that support the conclusion reached in answer to your second inquiry. However, you do not have authority to pay the salary of the Superintendent of County Roads and Bridges from the Gasoline Tax Fund that is received by your county from the State of Alabama because of the fact that Section 5, supra, provides that his salary be paid from the Road and Bridge Fund or the General Fund of the County. It seems very clear from

the provisions of Section 5, supra, that the legislature intended that the salary of the Superintendent be paid from either the constitutional Road and Bridge Fund or the General Fund and not the Gasoline Fund. The constitutional Road and Bridge Fund of the county and the Gasoline Tax Fund received by the county from the State are separate funds which, along with other funds, make up the General Road Fund of the county, but each of said funds must be expended in accordance with the statutory provisions regulating the expenditure thereof. **Ramage, Parks & Co. v. Folmar,** 214 Ala. 661, and **Ramage, Parks & Co. v. Flomar,** 219 Ala. 142. A county governing body cannot by resolution, or otherwise, direct the expenditure of the Gasoline Tax Fund received by the county from the State for the payment of a claim which the legislature has, by statute, made a claim against another fund or funds. **Weaver v. Tidwell,** 228 Ala. 169.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 29, 1937

Hon. L. E. Hall,
Circuit Clerk,
Pike County,
Troy, Alabama.

Costs—Witness fees, which are not paid by the Convict Department, under Section 3667, Code of 1923, are payable out of the fine and forfeiture fund provided there is a valid judgment for costs covering same against the defendant and execution properly issued and returned "no property found." However, execution cannot issue if defendant has worked out said costs in hard labor cases.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of August 10, 1937, which is as follows:

"On October 29th, 1936, you rendered an opinion to Hon. Chas. W. Lee, State Comptroller regarding fees of witnesses summoned to appear in more than one case in the same day; said opinion appears on page 65, Quarterly Report of Attorney General for period October 1st, 1936 through December 31st, 1936, and in this opinion as well as in former opinions therein cited, you hold that a State witness summoned in more than one criminal case in the same day, if held over from one to the other, is entitled to his per diem in as many cases as he is summoned and held over for and proves his attendance but only entitled to mileage in one case.

"I have now some cases where the same witnesses were subpoenaed in more than one case set for trial the same day, and upon the witness presenting his subpoena to me on the same day of the trial, thus proving his attendance I issued him witness Certificate in each case where he attended as a witness for his 75c per diem except in one case and that of the witness election and in that one I issued him a Witness Certificate for his 75c per diem and 5c per mile traveled to and from Court, under Section 3770 of the Code of Alabama of 1923, and under

information received through opinions of the Attorney General as cited in the opinion hereinabove mentioned. Now the State Convict Department refuses to pay the fees of a witness in more than one case in the same day and cites as their authority for such refusal that certain part of Section 3667 of the Code of Alabama of 1923 which reads as follows:

" 'But no witness shall be entitled to fees in more than one case on the same day.'

"And the Convict further states to me that 'if a witness proves attendance in more than one case on the same day the charge would be one to be absorbed by your fine and forfeiture fund.'

"We are operating under the General Law in this County, That is, where witness fees are collected by me as Clerk either from the Defendant or from the State Convict Department I turn such fees over to the County Treasurer to be credited to the fine and forfeiture fund and certify that Witness Certificate covering such fees as a proper claim vs. the fine and forfeiture fund and upon my certificate they are paid from said fund but I only can certify such certificates as I have actually collected and delivered the money to cover, Now if the Convict Department is correct will you advise me how the witness certificate which the Convict Department will not pay can be gotten in proper shape to be paid by the County Treasurer out of the fine and forfeiture fund?"

In answer to your inquiry, I am of the opinion that witness fees, which are not paid by the Convict Department under Section 3667, Code of 1923, are payable out of the fine and forfeiture fund provided there is a valid judgment covering same against the defendant, and execution is properly issued and returned "no property found." However, execution cannot issue if defendant has worked out said costs in hard labor cases.

An opinion of this office found in Quarterly Report of Attorney General, Vol. 5, p. 65, deals with the question as to the payment of witness fees to one who testified in more than one criminal case in one day. Under Section 3667, Code of 1923, the Convict Department can only pay the same witness one time for testifying in one day although he testified in more than one case. Therefore, if a witness be entitled to fees for testifying in more than one case on the same day and the Convict Department will pay only one witness fee, the question then presents itself as to how the other witness fee or fees to which he may be entitled can be paid. In my judgment, such a situation should be treated as any other item of costs which is properly taxable against the defendant and which is not paid by the Convict Department under Section 3667, supra.

Considering the proposition of the payment of costs from the fine and forfeiture fund, in an opinion of this office found in Quarterly Report of Attorney General, Vol. 2, p. 118 the following conclusions were reached in dealing with hard labor cases:

"1. Execution for costs may issue only upon a valid and unpaid judgment therefor.

"2. While the convict may not be compelled to serve more than ten months to pay costs, if after serving the maximum sentence there remains an unpaid balance, execution may issue for said unpaid balance.

"3. Execution may issue upon a valid, unpaid judgment at any time before sentence for costs is served, subject to the limitations of the law governing such issuance of execution.

"4. The labor of the convict is an extinguishment pro tanto of liability for costs. Such credit for costs must be allowed at the rate of seventy-five cents per day.

"5. No execution may issue for costs or any part thereof, previously paid in labor."

Said opinion is dealing with felony cases in this respect states as follows:

"In felony cases, the convict does not work out costs, as he is not sentenced therefor. Such costs are payable however upon proper issue and return of execution 'no property found', from the fine and forfeiture fund."

However, the above rules are limited in two respects: (1) Execution must be properly issuable and cannot issue for costs against a defendant for any items the State fails to pay under Section 5667, supra, after he has been sentenced to hard labor and actually worked out all costs, etc.—**Biennial Report of Attorney General, 1932-1934, p. 436;** (2) Any items of cost that are paid by the Convict Department are not again payable by the defendant, and, therefore, execution cannot issue for same and, therefore, cannot be paid out of the fine and forfeiture fund.—**Quarterly Report of the Attorney General, Vol. 2, p. 118,** supra.

The premises considered, it follows that if a witness is entitled to witness fees for more than one case in the same day and only one is paid by the Convict Department, the remainder may be paid from the fine and forfeiture fund provided execution is properly issued and same is returned "no property found." However, execution cannot issue unless there is a valid judgment against the defendant for costs which includes this unpaid witness fee. And further, execution cannot issue if the defendant has worked out the costs in question in hard labor cases. In penitentiary case the defendant is not sentenced for costs and execution may issue if there is a valid judgment for costs.

If execution is properly issued and costs are collected out of defendant, then the clerk should certify these costs to the Convict Department and the convict given credit for same in hard labor cases. But this rule is different in penitentiary cases as the convict is not sentenced for costs in such cases. Therefore, no credit is allowed if any costs are collected from the defendant.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 29, 1937

Hon. Minus H. Johnson,
Clerk Circuit Court,
Walker County,
Jasper, Alabama.

Forfeiture—Bail Bond on charge of non-support.

Money derived from forfeiture of bail bond given to answer charge of non-support, must be paid to fine and forfeiture fund of county in which prosecution is pending.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"A defendant, on complaint of his wife, was tried in the County Court on a charge of non-support and was convicted. Defendant appealed the case to the Circuit Court and appearance bond was filed as per attached copy. On the date set down for hearing in the Circuit Court defendant failed to appear and the Court ordered forfeiture taken against his bondsmen. The forfeiture was made final in the sum of $100.00 and was paid by the bondsmen.

"Question: Does the forfeiture collected in this case accrue to the fine and forfeiture fund of the county, or does it accrue to the wife of the defendant?"

It is my opinion the money derived from the forfeiture of the bail bond, as mentioned in your letter, given to answer charge of non-support, should be paid to the fine and forfeiture fund of the county in which prosecution was pending. I find no law to except these funds from the operation of Section 4038, Code of Alabama, 1923, which reads as follows:

"Section 4038. FINES TO GO TO COUNTY, AND JUDGMENT ACCORDINGLY.—All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

Therefore, you will pay said money to the fine and forfeiture fund of your county, if the proceedings were pending there.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 29, 1937

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

Section 46—A violation of Section 46 to refill bottles to which is affixed a state revenue stamp for the purpose of indicating the payment of the tax under said act.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of October 25th in which you request my opinion as follows:

"The question has arisen on numerous occasions with regard to Section 46 of the Beverage Control Act in reference to the definition of re-used stamps. In order to intelligently answer what constitutes the

re-use of a revenue stamp, we would like to have your opinion on the following:

"Would it be a violation of Section 46 for persons to take empty bottles on which there is affixed the State Revenue Stamp and re-fill same with alcoholic beverages made by them or purchased not in accordance with the Alabama Beverage Control Act.

Section 46 of the Alabama Beverage Control Act provides that:

"Whoever * * * re-uses any stamp, crown or lid which has heretofore been used for the purpose of paying any tax provided in this act, or identifying any articles enumerated and defined in this act"

is guilty of a felony. The question raised by your letter is whether the refilling of a bottle to which is affixed the state revenue stamp with alcoholic beverages illegally made or purchased not in accordance with the Alabama Beverage Control Act is such a re-use of the stamp as is prohibited by this section.

I do not consider in this opinion the question of the other provisions of said Beverage Control Act violated by such a procedure set out in your letter.

In my opinion, the use of an empty bottle to which is affixed a state revenue stamp is a re-use of the stamp, crown or lid. If such re-use is for the purpose of paying the tax or for the purpose of identifying the article, the alcoholic beverages, then such re-use is a violation of Section 46 of the act. The mere refilling of the empty bottle to which is affixed a state revenue stamp would not in and of itself constitute a violation of this section, for it is only the re-use of the stamp either for the purpose of paying the tax or of indicating that the beverage was properly purchased from the Board, that is prohibited by this section.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 29, 1937

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Counties—No authority to borrow money from general fund to purchase road machinery and supplies, which money is to be paid back from gasoline tax fund. However, general fund moneys may be transferred to gasoline fund or road and bridge fund provided there is a surplus in general fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 18, 1937, which is as follows:

"Can a county legally borrow from the general fund to purchase road machinery and supplies, the money so borrowed later to be repaid from the gasoline tax fund?

"Dale County wants to purchase a Deisel Shovel and several trucks for use in road construction. We wish to pay cash and save interest charges, but have not sufficient cash in the gasoline tax fund at the present time for this purpose. We do have the money in the general fund to take care of these purchases, if we can legally use it this way, later returning the amount so used from future gasoline tax funds."

In answer to your inquiry, I am of the opinion that there is no authority to borrow money from the general fund to be paid later from the gasoline tax fund. However, general fund moneys may be transferred to the gasoline fund or road and bridge fund provided there is a surplus in the general fund.

I am unable to find any authority allowing the borrowing of money from the general fund to supplement the gasoline fund or the road and bridge fund. However, under the provision of Section 1351, Code of 1923, as carried forward as Section 161 of the Highway Act of 1927, (General Acts 1927, p. 392), the commissioners court is authorized to transfer to a road fund money from the general fund only where there is a surplus of such general fund.— **Biennial Report of Attorney General, 1930-1932, p. 446.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 29, 1937

Hon. H. E. Kendrick,
Tax Collector, Dallas County,
Selma, Alabama.

Taxation—Homestead Exemptions—Act 107, General Acts of 1936-37, page 113. Tax Collector required to honor credit certificate issued by Tax Assessor for homestead exemption. Variance between name in which property assessed and name of exemptioner does not prevent such Tax Collector from honoring certificate of credit properly issued by Tax Assessor.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of November 6th in which you request my opinion as follows:

"Assessment and Book of Collections show certain property assessed to A. The certificate of Homestead Exemption made out in the name of, and presented by B, who claims ownership and occupancy of the certain property assessed to A. Shall the tax Collector honor said certificate as credit against assessment of A? In other words, should the Tax Collector honor certificates of Exemption in cases where the name on abstract (or book) of collections is different from the name on certificate of Exemption, even though ownership and occupancy is claimed by holder of the exemption certificate? Some of these cases are caused by the death of the husband or wife since assessment was made for 1937 tax year, and Tax Assessor made out exemption certificate in name of living party, in whose name the property will be assessed for 1938 tax year.

"Please give me an opinion on this matter as soon as possible, as such cases come up daily."

By the opinion of this office to Honorable T. L. McKee, reported in Quarterly Reports Volume 8, page 292, it was held:

"Section 31 of an act entitled 'An Act to provide for the general revenue of the State of Alabama,' as amended, General Acts of 1936, page 4, requires that homestead must be separately listed and valued. This act was approved on March 12, 1936.

"The Legislature, by Act No. 107, approved Feb. 20, 1937, said Act appearing in the General Acts 1936-37, page 113, granted an exemption to homesteads from state taxes. The exemption granted under this act applies to taxes due October 1, 1937, and which were assessed October 1, 1936. In re: OPINION OF THE JUSTICES. 175 So. 690.

"The failure of the tax assessors separately to list and value the homestead and to credit the taxpayer with an amount equal to the state taxes on such homestead necessitated, after the rendition of the foregoing opinion, issuance of a proper credit on the amount of the taxes certified by the tax assessor to the tax collector as being due by the taxpayer. A certification without such credit was an error on the part of the tax assessor which he is authorized to correct.

"It is the duty of the tax collector to give the taxpayer the benefit of the exemption which the Legislature granted and to correct the amount of the certification by crediting the taxes of such taxpayer in an amount equal to that certified by the tax assessor as shown on the original certificate of credit or on a duplicate thereof but within lawful limits."

The circumstances set out in that opinion with reference to the exemptions being granted after assessments were already completed, quite often results in a variance between the name of the party making the assessment in October, 1936, and the party who will pay the taxes in October, 1937. As you set out in your letter, some of these cases are caused by the death of the party making the assessment. In other cases there are joint assessments in the name of all of the joint tenants, while under the opinions of this office only such of the joint owners as are in actual occupancy are entitled to a homestead exemption. (See Quarterly Reports Volume 8, pages 19, 66, 267).

Under these and other circumstances the Tax Assessor is under a duty to grant a certificate of credit to the party entitled to such homestead, even though the assessment may have originally been made in another name. You as Tax Collector are under a duty to give the taxpayer the benefit of such exemption as evidenced by the certificate of credit made by the Tax Assessor. I realize there may be some administrative difficulties connected with those cases where the certificate of credit bears a different name from the original assessment, but in such cases the Tax Assessor could furnish you with the name of the original assessment for the taxes on which the certificate of credit should be applied. If the Tax Assessor has made an error in granting the certificate of credit he is responsible therefor and not the Tax Collector.

A similar situation is presented as in the case where the Tax Assessor made an erroneous assessment. You are obliged to collect taxes on the assessments as shown on the abstract furnished to you, as amended by the certificates of credit issued by the Assessor. For any error of the Tax Assessor, either in preparing the assessment rolls or in granting such certificates of credit, you are not liable.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

November 29, 1937

Hon. Edgar Underwood,
Judge of Probate,
Franklin County,
Russellville, Alabama.

Act No. 144, General Acts, 1935, page 180—providing for elections as to appropriations for agricultural program.

1. Ballot used in election as to appropriation for County Farm Agency work cannot contain unofficial questions.

2. Said Act sets up no official machinery for determining unofficial questions and same cannot be made a part of the official election, at the expense of the County.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your request of September 15, 1937, requesting my opinion as follows:

"Please advise me whether or not the Court of County Revenue of Franklin County, Alabama, has the authority to order a ballot in the form prescribed by Sec. 6 of the Act of the Legislature above referred to and also place on said ballot the additional question of whether or not the voter favored keeping in the service the present County Agent.

"A ballot substantially as follows would probably be sufficient to submit the matter to the voters of the County:

"Shall Franklin County, Alabama, appropriate $1800.00 for one year beginning October 1, 1937, for the purpose of aiding and financing a program for agriculture and Farm Home Life including County Farm and Home Demonstration work, in the said County in cooperation with the Extension Service created under an act of Congress of the United States approved May 8, 1914, and generally known as the Smith-Lever Act for extension work in Agriculture and Home Economics.

.....For Proposed Appropriation.
.....Against Proposed Appropriation.

"Shall the Court of County Revenue recommend a change of County Agents?

.....For Change.
.....Against Change.

"In the event you hold that the second proposition could not legally be placed on the ticket to be voted at such election please advise if another and separate ballot could be used for the purpose and cast at the election held for the purpose of casting the ballot with the first proposition thereon.

"The expense of printing separate ballots to be used for the second proposition would be borne by private citizens but the expense of the election would be borne by the county.

"If you hold that a separate ballot may be used for the second proposition, could the expense of the election at which both ballots are cast be paid by the county?"

It is my opinion that there is no authority conferred by law for the placing of the question of whether or not the voter favors keeping in the service the present County Agent upon the official ballot provided for by Section 6, General Acts, 1935, page 181, submitting for vote the proposed appropriation, for aiding in financing a program for Agriculture and Farm Home Life.

Mr. Justice Mayfield in the case of Gardina vs. Board of Registrars of Jefferson County, 160 Ala. 155, 48 So. 788, said the following: "Elections are the machines through which the voice of the people acting in their sovereign capacity is transformed into law. These elections must be exercised at the time, place and in the manner prescribed by the Constitution and statutes which the people, through their agents, have constituted." In order that an official election be held, the same must have been authorized. The legislature has not provided for the holding of an election upon the question of a change in the personnel of the office of the County Agent.

Therefore, no machinery for the official determination of this question by vote or election having been made, it cannot be placed upon the official ballot to be used in determining the question which has been authorized and for which machinery has been set up. Section 479 of the Code of Alabama, 1923, provides that "voting shall be by official ballot, printed and distributed as provided in this chapter, except when the form of the ballot is otherwise prescribed by law and no ballot will be received or counted in any election except it be provided as prescribed by law." The law prescribed the kind of ballot to be used in the election upon the above question. The official ballots must be in the form prescribed.

As to your question concerning the printing of separate ballots to be used for voting upon the question of a change in the personnel, I find no machinery set up by the Constitution or by the statutes authorizing such procedure or the means for the execution of such an election. As to the effect of any unofficial election which might be held as to this question, I refer you to my opinion addressed to Hon. J. R. Copeland, Judge of Probate, Blount County, under date of July 22, 1936, Quarterly Report of the Attorney General, Vol. 4, page 74. Such an expression or election would have no official standing and cannot be paid for by the County in any respect.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 29, 1937

Hon. L. W. Jordan,
Superintendent of Education,
Jackson County,
Scottsboro, Alabama.

School Code Amended—General Acts 1935, page 1092—Section 4 amending Section 182 of School Code prohibits school authorities from collecting incidental fees in high schools as well as grade schools

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of inquiry as follows:

"I beg to call your attention to Section 182, found on page 72 of the School Code of Alabama, 1927, which section refers to incidental fees. I also beg to call your attention to Section 4, found on page 1092 of the General Acts of the Regular Session, 1935. Please also refer to an opinion of your office, found on page 85 of the Quarterly Report of the Attorney General for the period of January 1, 1937 through March 31, 1937. Especially do I call your attention to the third paragraph of that opinion appearing on page 87, wherein, as it seems to me, your office has stated that the 1935 act repeals Section 182 of the 1927 act in such a way as to prohibit the school authorities from collecting incidental fees in high schools.

Stated a little differently, the question is this: Section 4, found on page 1092 of the 1935 act unmistakably repeals Section 182 of the 1927 act insofar as the first six grades are concerned, but does this Section 4 also have the effect of repealing Section 182 in the matter of the authority to collect fees from students attending high school? In my opinion, Section 4 does not have this effect. From a reading of the amendment of the 1935 act in connection with Section 182 of the 1927 School Code, it appears clearly to me that the attempt of the legislature is to leave undisturbed the authority of the school people to collect incidental fees from high school students. The opinion referred to hereinabove is not quite clear on this score. I will thank you to clarify your opinion and to let me know definitely whether, in your judgment, Section 4 of the 1935 act has the effect of denying to school authorities the right to collect incidental fees from high schools."

In the opinion referred to by you in your inquiry (Vol. VI, Quarterly Report of the Attorney General, pages 85, 87) it was held that the effect of an act of the legislature, General Acts 1935, page 1092, Section 4, was to repeal Section 182, by specific reference. At the time of writing said opinion it was not necessary to elaborate on this conclusion inasmuch as the statement contained in said opinion was limited to grade schools.

Section 4 of the 1935 Act reads as follows:

"Section 4. That section 182 of the Alabama School Code of 1927 be so amended as to read as follows: 182. INCIDENTAL FEES IN RURAL ELEMENTARY SCHOOLS.—No fees of any kind shall be collected from children attending any of the first six grades during the school term supported by public taxation."

In **Allgood v. Sloss-Sheffield Steel & Iron Co.**, 198 Ala. 500, 71 So. 724, it was held that "where a statute is amended 'so as to read as follows,' the amendatory act becomes a substitute for the original which then ceases to have the force of an independent enactment, and as much of the act as is omitted is repealed."

Section 182, as previously existing in the law, provided that "The Board of School Trustees shall have the power, with the approval of the Board of Education, to fix and collect reasonable incidental fees, to be paid by such pupil entering the school." Under the rule of construction set forth in the Allgood case, supra, the amendment of Section 182 clearly withdraws from the Board of School Trustees any authority to fix or collect incidental fees.

The conclusions hereinabove announced do not in any way prohibit the County Board of Education from levying the matriculation fee provided for in accredited high schools by Section 467 of the School Code of 1927, as follows:

"467. MATRICULATION FEE MAY BE CHARGED.—A matriculation fee may be collected for each semester from all pupils in accredited high schools, including County High Schools, the amount of such fee to be determined by the County Board of Education or the City Board of Education as the case may be, and the proceeds of such fees shall be expended under the direction of the County Board of Education or the City Board of Education as the case may be. A reasonable fee for library, laboratory and shop work may be required, the amount of such fee to be determined by the County Board of Education or the City Board of Education as the case may be."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 29, 1937

Hon. W. M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

License—When license inspector has cited person, describing motor number and car, to buy license, and said person sells the car to another person without purchasing license and the second owner applies for a license, he should be required to pay the penalty provided by Sub-section (c) of Section 353 of the 1935 Revenue Act and citation fee provided by Sub-section (g) of Section 353 of the 1935 Revenue Act, by virtue of the citation issued the first owner thereof.

(a) Sub-section (2) of opinion to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, Birmingham, Alabama, under date of October 24, 1936, Quarterly Report of Attorney General, Vol. V, page 52, is hereby withdrawn, overruled, and held for naught and this opinion is substituted in its stead.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 15, 1937, which is as follows:

"Please advise as to whether your opinion to Hon. Eugene B. Henry, dated October 24th, 1936 was intended to in any way over rule your opinion to the same party July 30th, 1936, in so far as this opinion relates to the collection of penalties from the transferee of an automobile, the former owner having been penalized."

The part of the opinion to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, Birmingham, Alabama, dated October 24, 1936, found in Quarterly Report of Attorney General, Vol. V, page 52, which deals with the same or a similar question that was dealt with by an opinion to him under date of July 30, 1936, Quarterly Report of Attorney General, Vol. IV, page 100, is the second part thereof. The second question dealt with in that opinion reads as follows:

"2. If A owns an automobile and drives it to a Dealer on October 2nd and sells same to a dealer and he in turn resells this same car to

another owner on November 15th and the last mentioned owner applies for a license on November 15th is he liable for the penalty for the car being operated on October 2nd or could he make affidavit that the car had not been operated on the highways while in his possession without proper license and avoid paying the penalty."

The part of the syllabus of the opinion dealing with that question stated:

"2. Under facts party held not liable for penalty for delinquency."

The body of the opinion dealing with this question follows:

"In answer to question 2, I advise that in my opinion the penalty for delinquency would not attach to the **last owner** under the facts set out by you, if he has not actually operated the same himself."

In answer to your question, I advise you that this part of the October 24 opinion to Mr. Henry was not intended to in any way overrule or modify the opinion to him in July. To dispel any possible confusion that might exist in regard to the opinion of this office on this subject, the second part of the October opinion to Mr. Henry is hereby expressly overruled, withdrawn, and held for naught, and the following is subsituted in its stead:

The answer to the second question is covered by an opinion of this office under date of July 30, 1936, addressed to you, which is found in Quarterly Report of Attorney General, Vol. IV, on page 100, and holds as follows:

"Licenses—When License Inspector has cited person, describing motor number and car, to buy license, and said person sells the car to another person without purchasing license and the second owner applies for a license, he should be required to pay the penalty provided by Sub-section (c) of Section 353 of the 1935 Revenue Act and citation fee provided by Sub-section (g) of Section 353 of the 1935 Revenue Act by virture of the citation issued to the first owner thereof."

Therefore, under the facts set out in your inquiry, the person making application for automobile license on November 15 would be liable for the penalty for delinquency in the purchase of said license by virtue of the fact that the said automobile had been driven on the highways of the State subsequent to the beginning of the license year on October 1, notwithstanding the fact that it was so driven thereon by a prior owner and not by the present owner, who is making application for the license. However, in this situation the present owner would not be subject to the citation fee unless a citation had been issued to the prior owner, a copy of which had been filed with the probate judge, on which was shown the motor number of the vehicle.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

November 29, 1937

Hon. Howell Turner,
Secretary of State,
Capitol.

Dear Sir:

1. Elections—Notices required to be given by boards of Registrars of time and place of meeting either by posting bills or by newspaper publications, held payable by the State, upon approval of the Secretary of State.

2. No per diem provided for said services of posting notices of time and place of meeting of Boards of Registrars.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Inquires from members of the Boards of Registrars have reached me inquiring whether or not the State is liable for expense accounts for posting notices of the time and places of registration of voters. Also whether a per diem could be paid by the State therefor.

"Therefore, please advise me whether or not such claims constitute a lawful charge against the State, and whether or not it is my duty as Secretary of State to approve same."

In reply, I wish to advise you that in my opinion the publication of notices as provided for by Section 386 of the Code of Alabama, 1923, contemplates two methods of publication, namely: by posting notices at three or more public places in each election precinct and by advertisement once a week for three successive weeks in a newspaper if there be one published in the county. I refer you to Section 375 of the Code of Alabama, 1923, which provides in part as follows:

"They shall give at least twenty days' notice of the time when, and the place in the precinct where they will attend to register applicants for registration, by bills posted at three or more public places in each election precinct, and by advertisements once a week for three successive weeks in a newspaper, if there be one published in the county * * *."

Section 386 of the Code of 1923, provides in part as follows:

"The cost of the publication of the notices required to be given by the registrars shall be paid by the state, the bills therefor to be rendered to the secretary of the state and approved by him."

In my judgment the legislature has defined the method of publication and has provided for the payment of expense accounts in connection with the posting of notices of the time and place of registration of voters which is one method of publication provided for by the legislature.

It is my opinion that the costs or itemized expense accounts for posting such notices should be paid by the State of Alabama upon approval by the Secretary of State to whom such itemized expense accounts must be submitted for approval. I find no provision for a per diem to be paid by

the state therefor. The resonableness of the charges made is a matter that addresses itself to the Secretary of State and in my judgment it is the duty of the Secretary of State to examine the expense accounts and approve the same.

I wish further to refer you to an opinion of this office addressed to Hon. W. H. price, Chairman, Board of Registrars, Madison County, Huntsville, Alabama, under date of November 18, 1935. (Quarterly Report of Opinions of the Attorney General, Volume I, page 91).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 30, 1937

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Funds collected by Livingston State Teachers College on old accounts may be used in paying teachers' back salaries.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of November 3, 1937, which is as follows:

"The salaries of teachers in the Livingston State Teachers College were not paid in full for the fiscal year ending September 30, 1934, nor for the fiscal year ending September 30, 1936. The amount of these unpaid balances for each of these years is $963.33 and $15,602.37, respectively.

"At the close of the fiscal year September 30, 1936 there were outstanding uncollected notes given by students in the amount of $36,175.11. These notes were given in payment of incidental fees, board and room, electric fees, and school supplies purchased from the college store.

"During the fiscal year which closed on September 30, 1937 the collections on the old accounts referred to in the preceding paragraph amounted to $6,835.24 which was distributed as follows:

| | | |
|---|---|---|
| "Incidental Fees | $4,447.35 | —General Fund |
| Board and Room | 2,379.59 | —General Fund |
| Electric Fees | 5.70 | |
| Supply Store | 2.60 | |
| | $6,935.24 | |

"Doubtless additional collections will be made on these accounts from year to year.

"I wish to have an opinion from you concerning the following questions:

"1. Can this institution legally use the total amount of $6,835.24 which was collected last year as well as total future collections on the

accounts which were made prior to the close of the fiscal year on September 30, 1936 to pay the back salaries of its teachers?

"2. In the event your answer to question number one is in the negative, can this institution legally use the amount of $4,447.35, covering collections of incidental fees, as well as future payments of such fees on accounts which were made prior to the close of the fiscal year on September 30, 1937 to pay the back salaries of its teachers?"

It is my opinion that the funds collected on old accounts must be used to pay the unpaid claims against the particular fund or account to which the funds should be credited. In my judgment claims against each of the accounts should be paid out of that part of the collection allocated to it. After the payment of such claims, if any, the remaining sum can be used to pay the unpaid claims against the other accounts, all of them being a part of the General Fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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November 30, 1937

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Bessemer, Alabama.

Taxation—Ad valorem exemptions on hospital.

1. Property used exclusively for hospital purposes and said purposes being purely charitable entitled to exemption from tax.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry of recent date which is as follows:

"The Norwood Hospital was owned by Dr. Carraway, of this city. He gave this hospital to the First Methodist Church of Birmingham with the understanding that it, and its income, would be used exclusively for charitable purposes only.

"The question I would like answered is:

"Is it entirely exempt or only the usual $20,000.00?"

I also have your letter of November 20, 1935, written in response to my request for additional information, as follows:

"Replying to yours of the 7th with reference to the Norwood Hospital and in answer to question No. 1 will say that the hospital is used exclusively for hospital purposes and for no profit or gain to the First Methodist Church.

"No. 2. Both indigent and pay patients are received.

"No. 3. The hospital is used primarily for charitable purposes and is not operated for the purpose of making a profit for the proprietor.

"This information was given me by the Secretary of the First Methodist Church and the attorney who handled the papers when the hospital was given to the church by Dr. Carraway."

Upon the above statements of fact, it is my opinion that the property is exempt from ad valorem tax under the Constitution, Section 91 in Article I, Section 3(a) of the Revenue Act of 1935. Said sections read as follows:

"Section 91. The legislature shall not tax the property, real or personal, of the state, counties or other municipal corporations, or cemeteries; nor lots in incorporated cities and towns, or within one mile of any city or town to the extent of one acre, nor lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, when same are used exclusively for religious worship, for schools, or for purposes purely charitable."

Article 1, Section 2(a), exempts the following property:

"All property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educational, religious or charitable institutions, society or corporation, let for rent, or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or chairtable purposes."

If any part of said statutory provision is in conflict with said Section 91 of the Constitution, the statute must yield to that extent to the Constitution. Since said statutory provision is the same as that existing in the Revenue Act of 1919, I refer you to the opinions of the Attorney General, to the Hon. John S. Mooring, Chairman, State Tax Commission, dated January 9, 1920, and July 23, 1920, respectively, Biennial Report 1918-1920. The general principles governing exemptions of property used for charitable purposes are fully set out therein. In addition to the authorities cited, I cite **State v. Alabama Educational Foundation,** 163 So. 527, 231 Ala. 11.

Briefly, the opinions, supra, held:

(a) "Exclusive use" does not preclude charging small fees so long as the entire property was primarily and inherently devoted to charitable purpose.

(b) Property owned by charitable organization but used for commercial purposes not exempt, the test being the use and not the ownership.

(c) Exemption of property of charitable institution is either entirely exempt or subject to taxation.

(d) Hospitals are exempt from taxation when any income received is devoted entirely for furthering the charitable object of the institution.

The above is also based upon the assumption that the property also complies with Constitution, Section 91, as to location and area.

In Act number 172, General Acts, 1923, page 153, the provision now being Section 2 (b)-(1) of Article 1, Revenue Act of 1935, made its first appearance. It reads as follows:

"All property, real or personal, used exclusively for hospital purposes, to the amount of twenty thousand dollars, where such hospitals

maintain wards for charity patients, or gives treatment to such patients, provided that the treatment of charity patients constitute at least 15% of the business of such hospital; provided further that such hospital need not be assessed for taxation if the owner or manager shall file with the County Tax Assessor wherein such hospital is located within the time allowed for assessing such property for taxation a certificate that such hospital has done 15% charity work in the preceding tax year; and further provided that such hospital through its owner or manager shall have until the expiration of the preceding tax year to class its work and ascertain whether or not such hospital has done 15% of its total treatment of patients as charity work."

This provision applies to all property used exclusively for hospital purposes, to the amount of twenty thousand dollars, regardless of the charitable or commercial purpose of the proprietor or institution, provided "the treatment of charity patients constitutes at least 15% of the business of such hospital irrespective of the fact that separate rooms, departments or wards were or were not maintained." **Gay et al vs. State et al,** 153 So. 767, 228 Ala. 253. It was the evident intent of the legislature to exempt all property used exclusively for hospitals under the proviso fixed, irrespective of the primary purpose being charitable or for gain or profit, as an exemption in addition to that provided in the Constitution to charitable uses.

The test is based upon the determination of the question of fact in each individual case as to the use of the property, during the tax year for which the property is assessed. The question of exemption vel non and the extent of the exemption is determined by the use of the property and not by the ownership or the application of the income from the property. **Anniston City Land Company v. State,** 48 So. 659, 160 Ala. 253; **State et al v. Church of Advent,** 95 So. 3, 208 Ala. 632; **Gay et al v. State,** supra; **State v. Alabama Educational Foundation,** supra.

It is my opinion, upon the above facts, supra, that the Norwood Hospital comes within the facts necessary to exempt it from ad valorem tax.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 1, 1937

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Taxation—Exemption of Alabama State Fair Association—Section 2, subsection (k), Acts of 1935, p. 258.

Tax exemption accorded Alabama State Fair Association not lost by reason of occasional use of property contrary to primary use upon which the exemption is based.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"The Alabama State Fair Association of Birmingham owns fifty or sixty acres of land with buildings including a grand stand, race

track, etc., however, the Association rents the ground for Ringling Brothers Circus and automobile races at other times during the year.

"Please advise me if the above mentioned Association is exempt from Ad Valorem assessment under Section 3028 of the 1923 Code and Subsection K of Section 2 of the Revenue Code of 1923."

It is my opinion that tax exemption accorded Alabama State Fair Association pursuant to Section 2, subsection (k), Acts of 1935, p. 258, and Section 3028, Code of Alabama, 1923, is not lost by reason of an occasional use of the property contrary to the primary use upon which the exemption is based.

I refer you to Corpus Juris, Vol. 61, pp. 401-402, paragraph 405, from which the following excerpt is taken:

"Also, it is the primary, as distinguished from an incidental, use of the property that determines the question whether it is exempt from taxation, and, as bearing on the question whether property is being used in a way to entitle its owner to an exemption, his application of the proceeds from its use and occupancy, as well as the fact of use and occupancy, must be considered, although it is not conclusive, the property owner's motive for his use of property being, however, immaterial."

Reference is made to Note 85, p. 402, supra, as follows:

"Town of West Hartford v. Connecticut Fair Ass'n, 92 A. 432, 88 Conn. 627; In re Assessment of Taxes of Waiahole Water Co., Ltd., 21 Hawaii 679; Peo. v. Omega Chapter of Psi Upsilon Fraternity, 167 N. E. 16, 335 Ill. 317; School of Domestic Arts and Science v. Carr, 153 N. E. 669, 322 Ill. 562; Peo. v. Catholic Bishop of Chicago, 142 N. E. 520, 311 Ill; Peo. v. Muldoon, 137 N. E. 863, 864, 306 Ill. 234, 28 A. L. R. 857.

" 'The primary use of a schoolhouse is for education, and an occasional use for a lecture or social affair will not destroy the exemption. Primary use of a church building is public worship, and its occasional use for some other purpose or a minor use for social functions will not render it liable to taxation. On the other hand, if the primary use is secular, the fact that a portion is incidentally used for religious purposes will not make it exempt from taxation.' Peo. v. Muldoon, supra."

The foregoing authorities support my conclusion that an occasional use of the property as outlined in your letter does not destroy the exemption accorded said Alabama State Fair Association by the laws of Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 1, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

The clerk of the circuit court is without authority under the law to collect five cents a mile for travel of witness and then pay the witness only four cents per mile.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter in which you request my opinion as follows:

"In making an examination of the Circuit Clerk of Sumter County the Examiners of Accounts find the Circuit Clerk makes out a cost bill to the State in Criminal Cases for Witness Fees as follows:

".75 cents a day and .05 cents a mile.

"When this Cost Bill is paid the Clerk takes the check and deposits same to the credit of the General Fund of the County, but in making out a witness certificate he shows on the face of the certificate 75 cents a day and .04 cents a mile.

"Has the Circuit Clerk any authority to collect .05 cents a mile for witnesses out of the State and pay to the witnesses .04 cents a mile?

"The Circuit Clerk stated that this had been a practice since 1909.

"I have searched the records and fail to find any local law that authorizes the Circuit Clerk to pay a witness .04 cents a mile."

There is no authority of law for the clerk collecting five cents per mile for travel of a witness and then paying the witness only four cents per mile. I call your attention to Section 3762, Code of Alabama, 1923, which is as follows:

"Section 3762. FEES AND COMPENSATION OF WITNESSES.—

Witnesses in criminal cases are entitled to one dollars per day and five cents for each mile to and from their residence by the route usually travelled, and all necessary ferriages and toll."

Of course, I understand the State only pays seventy-five cents per day under Section 3667, Code of Alabama, 1923, where the defendant is sentenced to hard labor, but the mileage is the same as under Section 3667, supra, as it is in Section 3762, supra,—five cents per mile for travel. If there is any local law to the contrary, I am unable to find it, and if there were a local law changing this fee or charge, it would be unconstitutional under Section 96 of the Constitution of 1901, which provides as follows:

"Section 96. The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 1, 1937

Hon. Gaston Scott, President,
State Highway Commission,
Montgomery, Alabama.

Highways—Tractor and Semi-Trailer on—Pneumatic tires used for hauling cotton and other farm products on highways of State lawful, but subject to license.

Opinion by Assistant Attorney General Thomas.

Dear Sir:

I have your letter of September 10, 1937, as follows:

"The State Highway Patrol has found an outfit operating on the highways of the State in Montgomery County which consists of a tractor known as a 'Farmerall' and semi-trailer. This outfit is being used to haul cotton and other farm products. This Farmerall is mounted on pneumatic tires and is designed for use in the fields in plowing or doing anything that required tractive power. The question has arisen as to whether this type of tractor drawing a semi-trailer is legal on the highways of this State.

"If you rule this tractor and semi-trailer are legal on the highways, under what license classification would it be placed?

"I would thank you to advise me as to the legality of this outfit at your earliest convience as the owner of same operates a large farm and uses machinery entirely and this outfit is the only transportation he owns and he has a large amount of cotton to be hauled to gin."

I am of the opinion that the "Farmerall" is legal on the highways of this State, subject to the restrictions as to size and weight contained in Section 80 of the Highway Act (General Acts 1927—348, at page 378). The "Farmerall" complying with these restrictions, I find nothing which would prevent it being used on the highways of this State.

As to the question of license it is my opinion that when such a vehicle is used for **general hauling** as described in your letter then it is liable for a license. Schedule 158.10 of the License Schedule, Revenue Code of 1935 at p. 333 (Act No. 194—General Session 1935) reads as follows:

"SCHEDULE 158.10. For each MOTOR TRACTOR used on the highways of this State there shall be paid a license or privilege tax of one hundred dollars. Provided, however, that this license shall not be collected for a tractor when run on a highway to be **transferred** from one point to another for use on a farm, or when used on the highway for transferring what is commonly known as a 'portable saw mill' or a 'well-boring outfit.' "

Schedule 158.11 of said license schedule provides for an additional license for trailers and semi-trailers. However, under said schedule where the trailer is used by persons exclusively for the hauling of farm products raised by said farmers, then no additional license is required.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 1, 1937

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham, Alabama.

Homestead Tax Exemption—Where taxpayer entitled to exemption on October 1, 1936, and property sold to State in September,

1937 for 1936 taxes, taxpayer does not lose exemption from 1937 taxes.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of November 18, 1937, in which you request my opinion as follows:

"John Doe assesses real estate for the tax year of 1936, but does not pay his tax and in September, 1937, I sold his property for 1936 tax to the State of Alabama.

"For the tax year of 1937 he has regularly assessed his property as per abstract furnished me by the Tax Assessor, and it has been the custom heretofore that to enable the taxpayer to meet his tax obligations that I allow him to pay me the tax on his property for one year subsequent to the year for which it was sold—in this case, for the year 1937. This payment, of course, is recognized by the Probate Judge when the taxpayer applies to him for redemption of his property, and 1936 tax being all that is due same is paid to the Probate Judge in redemption.

"These two transactions clear the tax record of the property. For the tax year of 1937 the question of homestead exemptions arises, which exemption is based on the status of the property as of October 1, 1936 or before same was sold to the state.

"In the event the taxpayer wishes to pay me the 1937 tax and has a valid claim for homestead exemption would I be authorized to grant such exemption after the property had been sold to the state?

"I would appreciate an early opinion from you on this subject as there are numerous cases in this county which I will have to handle in the next few weeks."

In the opinion of this office reported in Quarterly Report Vol. 8, page 265, I held that the right to homestead exemption from 1937 taxes was to be determined from the status of the property as of October 1, 1936. This followed a previous opinion of this office to the same effect.

In the opinion reported in Quarterly Report, Volume 8, page 284, I held that the former owner of property was not entitled to homestead exemption from taxes while the title to that property was in the State of Alabama pursuant to a previous tax sale. The basis for this opinion was that, upon the sale to the State, the taxpayer no longer had a right of occupancy sufficient to support a homestead claim.

Under the particular facts set out by you in your letter, it appears that on October 1, 1936, the taxpayer was rightfully in possession of the property and at that time the State of Alabama had no right in the property other than its tax lien for 1936 taxes. It therefore appears that the reason for my opinion in Quarterly Report, Volume 8, page 284, is not applicable to the state of facts set out in your letter. It is therefore my opinion that since the taxpayer mentioned in your letter was rightfully in possession of the property on October 1, 1936, he has a valid claim for homestead exemption from 1937 taxes and this right to exemption would not be affected by the sale to the State in September, 1937.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 3, 1937

Hon. C. M. A. Rogers,
Senator, 33rd District
Mobile County
Mobile, Alabama

Taxation-Chichester Tax Act, Number 126.

1. Gross receipts from sales of groceries made by ship chandlers are subject to Act, supra.

2. Gross receipts from sales of paint sold to Waterman Steamship Corporation to be used in the construction or repair of vessels or barges is exempt by Act, supra, Section 4 (L). Sales of paint to said corporation for resale or uses other than the construction or repair of vessels or barges are not exempt.

3. Gross receipts of sales of paint to any vessel in port to be used for construction or repair of vessel or barge is exempt by Act, supra.

4. Gross receipts of sales of paint to a repair plant, vessel or dry dock, to be used in the construction or repair of vessels or barges, exempt by Act, supra.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your inquiry of June 9, 1937, which is as follows:

"Numerous businesses in Mobile are engaged in supplying the shipping trade which comes to this city, I shall greatly appreciate it if you will advise me whether ship chandlers are required to pay the 2% Sales Tax on groceries sold ships.

"Waterman Steamship Corporation operates its own repair plant. A great part of this repairing consists in painting. It seems clear to me that where paint is sold Waterman Steamship Corporation or its repair plant the sales tax would not apply, because paint is an essential repair item of any vessel.

"In your letter to me of May 8th you discussed gross receipts derived from sales of materials to shipbuilding and repair plants for construction, repairing, towage or pilotage of vessels. In your opinion you stated that the exemption extended to gross receipts derived from the sales of materials to Shipyards and by them used in the construction, repairing, towage, or pilotage of vessels or barges.

"I shall appreciate it if you will advise me specifically:

"(1) Whether paint sold the repair plant of Waterman Steamship Corporation is exempt, and

"(2) Whether paint sold any vessel which may be in port is exempt.

"It occurs to me that the exemption should attach insofar as paint is concerned whether the sale be made to a repair plant or to a dry dock, or whether it be made to the vessel direct inasmuch as paint is so essential to the repair and maintenance of any vessel."

Although it may be correctly said that statutory provisions levying license or privilege taxes which are subject to two constructions, that most favorable to the tax payer must be adopted, (Williams vs. Puch, 129 So. 792, 24 Ala. App. 57), exemption from the application of said provisions are to be strictly construed. Ship-chandlers, repair plants, dry docks, construction plants and vessels come within the provisions of the Chichester Act levying license or privilege taxes, except by virture of the exemptions provided.

I quote the following which is quoted with approval in **Garlington vs. City of Birmingham,** 125 So. 208, 23 Ala. App. 282, cert. den. 125 So. 210, 220 Ala. 338:

> "An exemption from license taxation under a constitutional or statutory provision is in derogation of common right and must receive a strict interpretation and no claim to exemption can be sustained unless it is clearly within the scope of the exempting clause. The existence of an exemption will not be presumed, but must be clearly proved, and if there is any doubt, the uncertainty will be resolved against the exemption. Corpus Juris, 238."

It is my opinion that groceries sold by ship chandlers are not within the languages used in the exemption provided in Section 4 (L), since they are not materials or products used in the construction or repairs of vessels or barges.

In the absence of showing that word "repair" has a restricted meaning, in trade and commerce, it includes "maintenance painting" of a ship. E. E. Kelly & Company vs. U. S., 17 C. C. A. 30, 32. It is my opinion that paint is an ordinary and necessary product in the repair and construction of vessels and barges and gross receipts from sales of paint to the Waterman Steamship Corporation for use in the repair and construction of vessels was intended to be exempt and is exempt by the Chichester Act from the license or privilege taxes to be levied, since the exemption upon said paint when so used can only be granted by extending the exemption to sales of such materials to the corporation or its repair plant. Refer to my opinion to you of May 8, 1937.

It is my opinion that the exemption of gross receipts from sales of paint sold to any vessel in port to be used in construction or repair of the vessel is exempt, since the gross receipts are from sales of products for the construction or repair of vessels or barges, irrespective of the person, firm or corporation performing said construction or repair.

It is my further opinion that gross receipts from sales of paint used in the repair or construction of vessels or barges is exempt by the Chichester Act, irrespective of whether the sale is made to a repair plant, vessel or dry docks, said paint being ordinarly used in and necessary to said repair or construction.

These opinions with reference to paint do not apply to paints sold to any of the above for resale or use other than as specified.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 3, 1937

Hon. A. D. Kirby,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Probate Judge cannot legally employ attorney to be paid out of the expense allowance provided for in Section 370 of Act No. 194 approved July 10, 1935 (General Acts 1935, page 256).

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of October 8, 1937, which is as follows:

"I want to ask you if under the present law limiting the income of the Probate Judge's office, if I can pay an attorney a fee for representing and legally advising the Probate Judge in regard to his official office, and if I can charge that fee or salary in my allowance of Clerk hire of $450.00 per month, as is the case in this county."

Section 370-A of Act No. 194 approved July 10, 1935 (General Acts 1935, page 256) is as follows:

"The fees, compensations and earnings of the Judges of Probate allowed under the revenue laws of the State, shall not together with all other fees, compensations, allowances and earnings to them, exceed six thousand dollars net per annum, after the payment of the salaries for clerks, typists, stenographers and other office expenses in counties where the Judge of Probate is not paid a fixed salary; and the expenses of the office in such Counties for Clerks, typists, stenographers and other expenses shall not exceed in counties having a population according to the Federal Census as follows: 10 to 30 thousand—$300.00 per month; 30 to 40 thousand—$450.00 per month; 40 to 50 thousand—$750.00 per month; 50 to 85 thousand—$850.00 per month; 85 to 110 thousand—$1,325.00 per month; 110 to 125 thousand—$1,500.00 per month; 125 to 500 thousand—$3,000 per month; Provided, however, in any county where the Judge of Probate does not act as Chairman of the Board of County Commissioners, or such other like governing body, the Board of County Commissioners or such other like governing body, may reduce the salaries for clerks, typists, stenographers and other office expenses, but not to exceed fifty percent of the Schedule set out herein."

I know of no statutory authority which permits the Probate Judge to employ counsel to assist him and to pay for such counsel out of the county funds. The use of the expense account allowed by the aforecited Section would be the use of County funds.

Of course, the Court of County Commissioners has the authority to employ counsel to assist them.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 3, 1937

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Schedule 146, Revenue Laws of Alabama, as amended by Act 230, Special Session, 1936-37—Transient vendor using motor vehicle for purpose of transporting merchandise but not as a rolling store, liable for license tax under sub-section (b) of said schedule.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of October 7, 1937, in which you request my opinion as follows:

"Under Schedule 146 of the Revenue Laws of Alabama as amended March 2, 1937, there is levied a license of $30.00 for each itinerant vendor or peddler of merchandise using a motor vehicle for the purpose of transporting merchandise from place, etc. Those is also levied under sub-section (c) of same Schedule a license of $150,00 for each transient vendor or peddler using a vehicle for transporting merchandise, etc.

"We have a number of parties in this county who have bought trucks and built bodies for the purpose of transporting merchandise from place to place, who carry a general line of dry goods and groceries, who sell to the public from these trucks, but who do not allow the public to enter their trucks. We have been called upon by these parties to advise them which section of the above mentioned schedule applies to them.

"Please advise us what license we should sell to these parties operating trucks going from house to house, carrying a general line of dry goods and groceries and selling to the public from such trucks."

Schedule 146, as amended by Act No. 230 of Special Session of 1936-37, approved March 2, 1937, (Acts 1936-37, p. 277) provides as follows:

"Each person traveling on an animal or using a vehicle other than a motor vehicle, doing business as a Transient Vendor or Peddler as defined in this Schedule, displaying, selling or offering to sell any goods, wares or merchandise, other than to a merchant for resale, shall pay a privilege license to the State of Alabama of Fifteen Dollars ($15.00) and Five Dollars ($5.00) for the county in each county in which transient vendor or peddler does business for each vehicle. (b) Each itinerant vendor or peddler of merchandise, other than tobacco products, medicines or household remedies, who operate on foot or use a vehicle solely for the purpose of transporting merchandise from house to house or place to place but who do not use such vehicle for the display of merchandise or as a rolling store and who do not permit purchasers to enter said vehicle for the purpose of purchasing merchandise, shall pay an annual license of Twenty Dollars ($20.00) to the State and Ten Dollars ($10.00) to the county in each county in which they do business. This sub-section shall not apply to sales by a licensed merchant in the county in which his store is located. (c) Each person using a motor vehicle, doing business as a transient vendor or peddler as defined in this Schedule displaying, selling or offering to sell any goods, wares or merchandise of whatever nature, at retail shall pay to the State in

order to engage in such business the following licenses: Upon one (1) motor vehicle, the annual license for each such motor vehicle, not in excess of one, so used, of.....$100.00. Upon two motor vehicles, or more, but not to exceed three, the annual license fee for each such additional motor vehicle shall be.....$130.00. Upon more than three motor vehicles, but not to exceed six, the annual license fee for each such additional motor vehicle shall be.....$150.00. Upon each motor vehicle in excess of six, for each such additional motor vehicle $200.00. In addition to the above, there is levied a license of.....$50.00 for the State and a county license of $50.00 in each additional county in which said business is conducted. Rolling stores which are controlled or held with others by stock ownership of 25% or ultimately controlled or directed by one management or association of ultimate management, shall be deemed for the purpose of this Schedule as being owned by the same person. (d) Each person going from person to person, place to place, or town to town, selling or giving away medicine, salves, ointments, lotions or other goods, wares or merchandise, by exhibitions, shows, performances or other entertainment, whether sold for himself or another, in each county where such sales or gifts are made, shall pay a license of one hundred dollars ($100.00). Definition of Transient Vendor or Peddler: When used in this Schedule, the words 'Transient Vendor or Peddler' shall be held to include any person embraced in any of the following classifications: (a) All persons commonly and generally termed 'peddlers' and falling within the usual and commonly understood definition of 'peddler', or, (b) all persons acting for themselves or as an agent, employee or salesman, or in any capacity for another whether as owner, bailee, or other custodian of goods, wares and merchandise, going from person to person, house to house, or place to place, and selling or offering to sell, or consigning or offering to consign, other than to a retail merchant for re-sale, goods, wares and merchandise; or, (c) all persons who do not keep a regular place of business, open at all times in regular business hours at the same place, going from person to person, house to house, or place to place, or from town to town, and selling or offering for sale, other than to a retail merchant, goods, wares, and merchandise which they carry with them and who deliver the same at the time of or immediately after the sale; or, (d) all persons who go from person to person, house to house, place to place, soliciting orders, other than from a retail merchant for re-sale, by exhibiting samples, or taking orders and thereafter making delivery of the goods or filling the order, without carrying or sending the order to the permanent place of business. This Schedule shall not apply to a person or to any number of his immediate household, selling or offering to sell dairy, poultry, or farm products raised, produced or grown by himself, or the immediate members of his household, or such products preserved, bottled, or canned by himself, or the immediate members of his household, or to persons peddling wood, charcoal, fruit or vegetables; or to blind persons or persons physically disabled to the extent of thirty per cent (30%), such disability to be certified to by a reputable physician and the local license inspector, operating other than a rolling store, or to peddlers of poultry and eggs, or to persons selling fish, shrimp, crabs or to other sea foods. These and none other shall be exempt from the payment of the license tax levied by this Schedule. The payment of the privilege license required by this Schedule shall not authorize any transient vendor or peddler to sell any goods, wares or merchandise for which a higher or specific license is required without the payment of such license in addition to the license herein levied, or to sell any goods, wares or merchandise that are by law required to be sold at a fixed location, except upon the payment

of the maximum license levied under the Schedule or Schedules of this Chapter for the sale of merchandise at a fixed location."

The question raised by the facts set out in your inquiry is whether such itinerant vendor or peddler is liable for license under Section (b) or under Section (c). Section (b) levies a license or privilege tax upon each itinerant vendor "who operate on foot or use a vehicle solely for the purpose of transporting merchandise from house to house or place to place, but who do not use such vehicle for the display of merchandise or as a rolling store, and who do not permit purchasers to enter said vehicle for the purpose of purchasing merchandise." Section (c) levies a much higher license upon persons using a motor vehicle and doing a business as a transient vendor or peddler, as defined in the schedule. The distinction between the persons liable for license under Sub-section (b) and under Sub-section (c) is whether such persons use said trucks solely for the purpose of transporting or whether such vehicles are used for the purpose of displaying and permitting purchasers to enter thereon. Under the facts set out in your letter, the vehicles are to be used solely for the purpose of transporting goods. If such vehicles are so used and are not used for the display of merchandise or as a rolling store, and such vendor does not permit purchasers to enter said vehicle for the purpose of purchasing merchandise, it is my opinion that such vendor would be liable for license under sub-section (b) of said schedule. On the other hand, if such vehicle is used to display such merchandise or as a rolling store, or if such vendor permits purchasers to enter said vehicle for the purpose of purchasing merchandise, he would be liable for a license under sub-section (c) of said schedule.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 3, 1937

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

1. Under the provisions of Sections 23 and 23-A of the Revenue Act of 1935 (H. B. 324, approved July 10, 1935, General Acts 1935, pages 256, 272) as amended, that part of the sum allowed Tax Assessors for the payment of clerks, typists, stenographers and other office expenses which is not used for those specific purposes reverts to the general fund.

2. Duty of such tax assessor to keep a full and detailed account of such expenses.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

This is to acknowledge receipt of your letter of November 1, 1937, as follows:

"Several tax assessors throughout the State have written me, and, in order to not have so many opinions issued to various assessors, have requested that I ask for one opinion governing Section 23 and 23-A of House Bill No. 324.

"To be more specific, they would like to know if after having taken out the $5400 maximum allowed for salary and, in a county of 50,000 to 65,000 population where an allowance is set amounting to $4200 per year to take care of all expenses in connection with the work in that office, and, where the earnings do not exceed $9600 per year, if, under these circumstances, the State should require an itemized statement of the expenses incurred? Or does the assessor have to make any kind of report inasmuch as he has been allowed the specific amount of $5400 for salary and $4200 for expenses.

"Section 23-A specifically states that any excess over these amounts would accrue to the general fund.

"As you know, I do not earn any fees, am on a salary and am asking for this opinion in order that you may write one opinion to cover all assessors and collectors coming under these sections of the Revenue Code."

Sections 23 and 23-A of the General Revenue Bill of 1935 are as follows:

"Section 23. The fees, compensation and earnings of the Tax Assessor allowed under the revenue laws of the State, shall not together with all other fees, compensations, allowance, and earnings to them, exceed Five Thousand Four Hundred Dollars ($5400.00), net annually. Provided that after the term of office beginning with the first of October, 1935, expires, then the fees, compensation and earnings of the Tax Assessor allowed under the revenue laws of the State, shall not together with all other fees, compensation, allowances, and earnings to them exceed four thousand dollars ($4000.00) net annually. After the payment of the salaries for clerks, typists, stenographers, and other office expenses in Counties where the Tax Assessor is not paid a fixed salary; and the expenses of the office in such counties for clerks, typists, stenographers, and other expenses shall not exceed in counties having a population according to the Federal census as follows: 10 to 30 thousand $100.00 per month. 30 to 40 thousand $150.00 per month. 40 to 50 thousand $250.00 per month. 50 to 65 thousand $350.00 per month. 65 to 85 thousand $500.00 per month. 85 to 110 thousand $750.00 per month. 110 to 125 thousand $1200 per month. 125 to 500 thousand $2500 per month."

"Section 23-A. In such Counties where the earnings from all sources exceed the expenses and compensation to the Tax Assessor allowed in the above Section, the excess thereof shall not accrue to the Tax Assessor but shall accrue to the general fund of the County, and shall by the Tax Assessor be paid over to the County Treasurer and by him covered into the General Fund of the County."

Section 23, supra, was amended by Act No. 71, approved February 9, 1937, Acts 1936-37, Special Session, page 91. The amendment, however, has no bearing on the question here involved.

It is my opinion that the moneys allocated to Tax Assessors for expense purposes must be expended for the purposes specifically enumerated, i. e., for payment of salaries of clerks, typists, stenographers and for other office expenses. If the maximum amount allocated for these purposes is not expended therefor, it is my judgment that that part not so used must be turned over to the county treasurer to be covered into the General Fund. In my judgment, if the Legislature had not intended that the expense allowance be used actually for the necessary expenses of the office then it would have provided a lump sum payment to the Tax Assessor allowing him to employ

such clerical assistants and to incur such expenses as in his judgment were necessary.

With this conclusion settled the question is then raised whether the assessor has to make any kind of report and, specifically, whether the assessor should make an itemized statement of the expenses incurred. In my opinion, the assessor is required to keep an itemized account of these expenses. As above stated, the allowance of $4200.00 for expenses is a maximum allowance and unless such amount is actually expended the tax assessor is not entitled thereto, but such amount should be paid into the general fund of the county. There is no specific requirement in the statute under which the assessor would have to make any kind of a report. However, there is always a duty on public officers to account for public funds coming into their possession. Under the provisions of Code Section 2690 it is expressly required that all public officers shall keep accurately such books "as at all times to afford full and detailed information in reference to the activities or business required to be done or carried on by such officer or servant, and from which the actual status and condition of such activities and business can be ascertained without extraneous information." (See opinion of the Attorney General, Biennial Reports 1920-1922, page 374).

It is my opinion, therefore, that the tax assessor should keep records showing the detailed expenditures of these items of expense so that the amounts expended therefor could be determined from an examination of such records.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 3, 1937

Hon. James A. McCollum,
Solicitor of the Inferior
Court of Tuscaloosa County,
Tuscaloosa, Alabama.

Alabama Beverage Control Act.

1. Sections 4639 (unlawful to store prohibited liquors on premises where beverage business is conducted) and 4713 (unlawful to store, keep or warehouse prohibited liquors for another) of the Code of 1923 are not repealed by Alabama Beverage Control Act.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your letter of September 27, 1937, reading as follows:

"I have been asked to get your opinion as to whether or not Sections 4639 and 4713, or either of them, of the Code of Alabama of 1923, was repealed by the Alabama Beverage Control Act?"

Section 4639 is as follows:

"It shall be unlawful for any person, firm or corporation engaged in the business of selling beverages to keep or store on the premises where said beverage business is conducted, any prohibited liquors or

beverages, the sale, offering the sale, or other disposition of which is prohibited by the law of Alabama, and any person so violating this section shall be guilty of a misdemeanor."

Section 4713 is as follows:

"It shall be unlawful for any person, firm association, or corporation to receive for storage, distribution or on consignment for another prohibited liquors and beverages or any of them, or to have or maintain any warehouse or other place for the receiving, storing or distribution of liquors for another, and any person violating this section shall be guilty of a misdemeanor."

Section 61 of the Alabama Beverage Control Act contains the general repealing provisions of the Act. It reads as follows:

"All laws and parts of laws in conflict herewith, either special or general except as herein otherwise specially provided are hereby repealed, provided that nothing herein shall relieve any person, firm or corporation from any penalty or tax liability or forfeiture incurred under former laws, and nothing herein contained shall be construed as repealing any of the laws of Alabama relating to the manufacture or possession of illicit distilled liquor or apparatus for the manufacture of same, nor any law now fixing fees to officials for the enforcement of any and all laws, including this Act, but the same shall remain in full force and effect."

Only such laws and parts of laws as are in conflict with said Act, except as therein otherwise specially provided, are repealed and the said Section specifically provides that nothing therein contained shall be construed as repealing any of the laws of Alabama relating to the manufacture or possession of illicit distilled liquor.

We find no conflict between Sections 4639 and 4713, supra, and the provisions of the Alabama Beverage Control Act. Those sections refer to "prohibited liquors and beverages" and would be construed in connection with the Alabama Beverage Control Act as liquors and beverages now illicit or in violation of the law, said products having been redefined and provided for under the Alabama Beverage Control Act.

The following excerpt from Section 51 of said Act further evidences this intention of the legislature as follows:

"In all Counties of the State it shall be unlawful for any person, firm or corporation to have in his or its possession any still or apparatus to be used for the manufacture of any alcoholic beverage of any kind, or any alcoholic beverage of any kind illegally manufactured, or transported, within the State, or imported into the State from any other place without authority of the Alcoholic Control Board of the State, and any person, firm or corporation violating this provision or who transports any illegally manufactured alcoholic beverages, or who manufactures illegally any alcoholic beverages, upon conviction shall be punished as now provided by law."

Finding no express repeal of Sections 4639 and 4713 of the 1923 Code, and there being no conflict with the Alabama Beverage Control Act, and further there being no intention of the legislature to repeal the existing prohibition laws of the State except as expressly done or by necessary implication, I am of the opinion that said Sections of the Code were not re-

pealed by the Alabama Beverage Control Act, but that they still operate upon prohibited liquors as now defined by the provisions of the Alabama Beverage Control Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 20, 1937

Hon. C. B. Gullatt, Jr.,
Judge of Probate,
Russell County,
Seale, Alabama.

1. Tax Sale void based on facts given.

2. Tax Deed not to be delivered to executor of deceased purchaser—Terms of will govern.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of November 6, 1937, which is as follows:

"At the 1933 tax sale held Dec. 7, 1934, Mr. J. C. Walker became purchaser of the following described land, sold in the name of O. K. Thigpen:

"House and 5 acres in Uchee Bd.: North by Federal Road, E—by Road and S & W—by Thigpen.

"At the 1936 tax sale held July 19, 1937, the State became purchaser of the identical land, sold in the name of O. K. Thigpen, and described as follows:

"House and 5 acre lot in Uchee, Bd.: N & E—Federal Road, S & W—Thompson lands.

"Mr. J. C. Walker, purchaser at 1933 tax sale, died on or about October 14, 1935, and Dec. 13, 1935, Letters Testamentary were issued to Messrs. Giles P. Walker and E. P. Lloyd as the Executors of the Estate of Mr. J. C. Walker.

"The Executors of Mr. J. C. Walker's estate have made application to redeem from the 1936 tax sale, at which the State became purchaser of above described lands, and request that tax deed issue to them as such executors upon surrendering certificate issued to Mr. J. C. Walker on Dec. 7, 1934, together with redemption certificate showing payment of 1936 and 1937 taxes.

"Please advise me if said executors have right to redeem this land from the State under 1936 tax sale.

"Also advise me if I am authorized to issue tax deed to Messrs. Giles P. Walker and W. P. Lloyd as the executors of the estate of Mr. J. C. Walker."

In writing to the questions presented by your request I am assuming that Mr. O. K. Thigpen, the original owner, did not redeem prior to the alleged sale on July 19, 1937, and will not redeem on or before December 7, 1937, and that the land alleged to have been sold at both sales is the same identical land. I am also assuming that by the use of the words "became purchaser of the following described lands etc." that you mean to convey that he paid the necessary sum of money and received the prescribed certificate of purchase.

Mr. Walker having purchased the land at the tax sale on December 7, 1934, the lands should have been assessed to him for the succeeding tax years and therefore the tax sale held on July 19, 1937 is null and void as it was sold in the name of the original owner, Mr. Thigpen, who had not redeemed.

As Probate Judge of Russell County, you should notify the Land Commissioner of this fact and have the tax sale to the State of Alabama cancelled.

The sale held in July, 1936, being illegal, of course, the executors of Mr. Walker's estate cannot redeem therefrom.

You are confronted therefore with the question as to whether or not such executor, upon presentation of the certificate of purchase, together with accrued taxes and interest etc., is entitled to receive a tax deed to such lands.

Section 241, H. B. 324, approved July 10, 1935, (General Acts 1935, pages 236, 260) generally referred to as the 1935 Revenue Bill provides as follows:

> "After the expiration of three years from the date of the sale of any real estate for taxes the Judge of Probate then in office must execute and deliver to the purchaser, other than the State or person to whom the certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the Judge of Probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels or lots purchased by him at such sale, and such deed shall convey to and vest in the grantee all the right, title, interest and estate of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the State and County thereto, but it shall not convey the right, title or interest of any reversioner of remainderman therein."

Under the terms of the section just quoted on Dec. 7, 1937, Mr. Walker, if living, would have been entitled to a tax deed to such property upon compliance with the provisions of the said Section.

I do not think, however, that the deed should be made to the executors. The party or parties to whom such deed should be made must be determined by the terms of the will.

The general rule in such cases is expressed in 61 C. J. 1341 as follows:

> "A tax deed made out in the name of deceased purchaser is a nullity as running to a grantee not in existence, in such a case the deed is properly made to his heirs or assigns but not to his administrator."

I particularly refer you to the case of **Alexander v. Savage,** 90 Ala. 383, 8 So. 93, from which I quote:

> "The statute invests the Probate Judge with the authority to execute a tax deed only to the following classes of persons: (1) to the original purchaser at the tax sale; and (2) to the assigns by written indorsement, of the certificate of purchase; (3) by necessary implication pos-

sibly, to the devises or heirs of a deceased purchaser; as to which, however, quaere?

"The deed among other things, recited the death of Matthew Alexander, the original purchaser at the tax sale, as having occurred on April 21st, 1876; and the conveyance is made jointly to the three administrators of said decedent, by name; for the use of the heirs; one of the said grantees having died, her personal representative is made a party plaintiff in this suit, in connection with the other two grantees as co-plaintiffs.

"Under this state of facts, the deed was clearly void for the want of authority in the probate judge to execute it to the administrators of the deceased purchaser, as grantor, this officer was acting under a limited power, a tax deed made to one substituted for the purchaser, or to any grantee other than the one sanctioned by statute, is void. The statutory authority to convey must be strictly pursued by the probate judge, and the deed made only to those to whom he is authorized by law to execute it."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 20, 1937

Hon. Charles W. Lee,
State Comptroller,
CAPITOL.

Taxation—Schedule 106—Section 348 Revenue Act of 1935, as amended by Act of 1936-37, page 210—Requirement that two-fifths of annual license levied by Schedule 106 as amended shall remain as a special fund is subject to the right of Judge of Probate to receive commission for collecting such license and the amount of such separate fund must bear its proportionate part of the commission of the Probate Judge.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of November 3rd in which you request my opinion as follows:

"Section 1 of the amendment to Schedule 106 of Section 348 of the Revenue Act of 1935 approved March 1st, 1937, provides among other things the following:

'Provided further that after the fiscal year ending September 30th, 1937, two-fifths of the annual license herein levied shall remain in the State Treasury and shall constitute a separate fund to be disbursed by the State Treasurer as follows: All of such funds arising from licenses paid in each of the separate counties of the state shall be set aside in a separate fund for such county and shall be disbursed by the State Treasurer on the order of the Board of Censors of the Medical Society of such county if there be such an organization in such county.'

"It is provided that the Probate Judges receive 2½% commission on all license collected and the balance remitted to the State. If a license under this amendment is $10.00, the Probate Judge receives twenty-five cents commission and remits to the State only $9.75.

"Then shall the Comptroller set aside two-fifths of $9.75 or two-fifths of $10.00 to be disbursed by order of the County Medical Society?"

Your matter involves the proper construction of the words "two-fifths of the annual license herein levied." By such schedule 106, as amended by the act approved March 1, 1937, (Acts of 1936-37, page 210) there is levied a license varying from $5.00 to $25.00, depending upon the size of the city or town where the particular business is conducted. However, all licenses levied by the Revenue Act are subject to the provisions of Section 365 thereof, which provides as follows:

"Section 365. Within ten days after the end of each month, the Judge of Probate must remit to the State Treasurer at the expense of the State, all money received by him for license belonging to the State, and pay to the County Treasurer all the money received by him for licenses belonging to the county, and within the same time the Judge of Probate shall forward to the State Comptroller and to the State Tax Commission each certified list of all licenses issued by him, stating thereon for what business issued, amount collected for each license, from whom collected, and the date of such collection; and if no licenses have been issued, he shall report that fact. The Judge of Probate shall be entitled to receive two and one-half per cent of the amount of money collected for licenses due the State, which he may deduct from his remittance to the State Treasurer."

The effect of this section 365 is to entitle the Judge of Probate to 2½% of the entire amount of money collected for licenses due to the state. Therefore, although the license levied under this schedule may amount to $10.00 originally paid, by section 365 the net amount received by the state is reduced by the commission of the Judge of Probate of 2½% on the entire amount of the money collected. In my opinion, the words "annual license herein levied" should be construed as subject to the provisions of Section 365 and the separate fund required to be established is reduced by its share of the commission of the Judge of Probate of 2½%. It is, therefore, my opinion that the Comptroller should set aside two-fifths of $9.75, the net amount of the license or the amount of the license less the cost of commission thereof, and not two-fifths of $10.00 or the gross amount of the license.

In the opinion reported in Quarterly Reports I, page 272, this office considered a similar section regulating licenses for attorneys. That section, however, expressly required that "Ten dollars of the license herein levied * * * shall constitute a separate fund." It was ruled that the express requirement was not changed by the provisions of Section 365. In another opinion reported in Quarterly Reports I, page 266, we construed a similar section as to dentists. In that act, the requirement was that 25% of all moneys paid into the State Treasury by dentists for license should be paid over to the Alabama Dental Associations. I reached the same conclusion there as reached here—that the percentage paid to the association is the percentage of the net rather than the gross license.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 20, 1937

Hon. Gaston Scott, President,
State Highway Commission,
Montgomery, Alabama.

Taxation—Lubricating Oil—Act No. 157, Special Session 1936-1937, —Proceeds of tax on lubricating oil under Schedule 138 Revenue Act of 1935 must be paid into State Treasury as required by Schedule 138.9 and is not affected by Act No. 157, Special Session 1936-1937.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 29, 1937, in which you request my opinion as follows:

"This department wishes to be advised upon the proper disposition of the revenue obtained from the tax on lubricating oil, as contained in Act No. 157, General Acts 1936-1937, page 179, approved March 4, 1937, and effective July 1, 1937.

"We are of the opinion that the above mentioned Act provides for the State Highway Department receiving the revenue, less the cost of collection, obtained from the tax on lubricating oil, however, the Gasoline Department of the State Tax Commission has been depositing these receipts to the credit of the General Fund of the State.

"Please give this matter your prompt attention and advise as this information is needed in completing our audit and in preparing our budget for the coming fiscal year."

Act 157 of the Special Session of 1936-37 (Acts of 1936-37, page 179) provides as follows:

"Section 1. The revenue, less the cost of collection, obtained from taxes on lubricating oil, gasoline, naptha, and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines as is provided for in Schedule 156.1 of House Bill 324, approved July 10, 1935, shall not be used for any purposes other than for the construction, improvement, and maintenance and supervision of Highways and bridges and streets, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes. The payment of the per diem and mileage of members of County governing bodies when engaged in supervising the construction, improvement and maintenance of highways, bridges and streets shall be construed as supervision under the provision of this Act.

"Section 2. All laws and parts of laws, general, local and private, in conflict herewith are hereby repealed.

"Section 3. This Act shall go into effect July 1, 1937."

Schedule 156.1 referred to in this act levies a tax on gasoline, naptha and other liquid motor fuels, but does not levy any tax on lubricating oil. The tax on lubricating oil is contained in Schedule 138 of the Revenue Law of 1935. It, therefore, becomes necessary to determine whether the words contained in Act 157, to-wit, "as is provided in Section 156.1" limit the other words of the statute so that the only taxes affected by this Act 157 are those taxes provided for in Schedule 156.1.

Such a construction would render nugatory the words "lubricating oil" since there is no tax on lubricating oil levied by Schedule 156.1. A contsruction which denies an effect to any words of the statute should be avoided and, if possible, that construction given which will give effect to each word in a statute. **Hawkins v. L. & N. Railroad Co.,** 145 Ala. 385, 40 So. 292; **State v. Western Union Telegraph Co.,** 196 Ala. 570, 72 So. 99.

If the statute were construed in accordance with this principle, the tax on lubricating oil would be ear marked for the purposes set out in this Act No. 157, to-wit, for the construction, improvement, etc., of highways, bridges and streets. Several insuperable difficulties, however, prevent the adoption of such construction of the statute. The fundamental rule of construction of statutes, to which all other rules are subordinate, is that we shall, by all aids available, ascertain and give effect to the intention or purpose of the Legislature. **Street v. Cloe,** 207 Ala. 631, 93 So. 591; **Sunflower Lumber Co. v. Turner Supply Co.,** 158 Ala. 191, 48 So. 510.

> "In interpreting a law, it is legitimate to take into consideration the history which led up to its enactment, the surrounding circumstances and the ends intended to be accomplished by the act." **Prowell v. The State,** 142 Ala. 80, 39 So. 164.

In considering this question I have considered carefully the history of the taxes both on lubricating oil and on gasoline. Since 1927, the excise tax upon lubricating oil is covered into the State Treasury to the credit of the State General Fund. Schedule 101, General Acts of 1927, page 139, Schedule 138.9, General Acts of 1935, page 494.) On the other hand, gasoline taxes have invariably been limited or restricted for highway purposes. (Acts of 1923, page 36; Acts of 1923, page 197; Acts of 1927, page 16; Acts of 1927, page 326; Acts of 1931, page 458; Acts of 1931, page 859; Acts of 1932, page 314; Acts of 1935, page 508, Schedule 156.) This policy of the State over a period of many years to limit the use of taxes on gasoline to highway purposes, while requiring the proceeds of the tax on lubricating oil to be paid into the General Fund, is entitled to some weight in according the proper construction to Act 157.

Two other great difficulties arise in according such construction to Act 157 as would limit the expenditure of the proceeds of the tax on lubricating oils. Schedule 138.9 of the Revenue Law of 1935 expressly provides:

> "The proceeds of the excise tax levied by this statute, shall, when collected be covered into the State Treasury to the credit of the State General Fund."

If a construction is accorded to Act 157 which would limit the expenditure of the tax on lubricating oils, then this specific section would be repealed by implication. Such repeal by implication is not favored. **Reid v. Wallace,** 168 So. 900. We have in this schedule 138.9 a very definite mandate covering a specific subject.

> "When a specific subject has been specifically provided for by definite legislation for a specific purpose, such legislation is not repealed by the subsequent enactment of legislation in general terms, although the general subject may include the specific subject.
>
> "I wish to refer you to the case of **City of Birmingham v. Southern Express Company,** 51 So. 159, 164 Ala. 529, in which the Courts said:'Where a specific subject has been explicitly provided for by law, it is not considered repealed by a subsequent law dealing with a general subject in a general way, though the specific subject may be included in the general subject.'

"I wish further to refer you to the case of the **City of Mobile v. Mobile Electric Company,** 84 So. 816, 203 Ala. 574, in which the Court said:

" 'Special provisions relating to special subjects control general provisions relating to general subjects. The thing specially treated will be considered as exception to the general provision. When a special subject has been specially provided for by law, it will not be considered as repealed by a subsequent law which deals with a general subject in a general way though the specific subject and a special provision may be included in the general subject and the general provision. 7 Mayfield's Lig. 850, and many cases there cited.'

"I wish to further refer you to **Fuqua v. City of Mobile,** 121 So. 693, 23 Ala. App. 74, Rev. (1928) 121 So. 696, 217 Ala. 1, Certiorari denied, 121 So. 697, 219 Ala. 3; see also **Scottish Union & National Insurance Company v. Baker,** 84 So. 480, 18 Ala. App. 188, Certiorari denied, **Ex parte Baker,** 84 So. 924, 203 Ala. 696." Quarterly Reports 7, page 58.

There is the further difficulty met in according a construction to Act No. 157 which would repeal this Schedule 138.9. We would then be left without any instructions as to the disposition of the proceeds of the tax on lubricating oil other than its being limited to the purposes named in Act No. 157. There is no instruction as to a division of the proceeds of such tax between the State, counties and municipalities. The use of certain language in the statute, to-wit, "streets" indicates some intention that the municipalities should share in the proceeds of the tax, while the reference to the per diem and mileage of County governing bodies indicates an intention that a portion should be paid over to the counties. There are, however, no instructions or guidance as to the proportions of any such division and it would be necessary to supply the further legislative enactment as to the distribution of the proceeds of such tax. Such legislation by the courts or by this office in construing a statute should always be avoided if possible, particularly where there is so much doubt as to the correctness of such judicial legislation.

Is there any reason or purpose which would support a construction of the Statute giving Act No. 157 effect only as to taxes on gasoline and other motor fuels as provided by Schedule 156.1? If such construction were afforded Act No. 157 there would be no necessity for any judicial legislation as to the expenditure or division of the proceeds, for the distribution of such gasoline tax is specifically provided by the other statutes which are not in conflict with or affected by Act No. 157. The expenditure of the gasoline tax has been limited by the statutes levying the same which are cited above. However, by the decision of the Supreme Court in the case of **Weaver v. Tidwell,** 153 So. 218, it was held that the gasoline tax could not be used to pay compensation for services rendered by the commissioners in supervising the roads of their districts. Act No. 157 specifically approves the use of the gasoline tax for such purposes and we thus have a very sound, logical purpose for the act without effecting a repeal by implication of Schedule 138.9. There is a further logical purpose for Act No. 157 and that is the repeal of local and private as well as general acts in conflict therewith. As you know, over a period of many years a custom has arisen of certain local statutes being passed authorizing the diversion of gasoline tax funds for purposes other than highway purposes. This had reached such a stage as to endanger the receipt of available federal aid appropriations. To prevent further diversion there was passed an act proposing an amendment to the constitution to require the use of the proceeds of such taxes solely for highway purposes.

Considering the history of the various acts, the policy of the State as reflected therein, the purpose of this act and the evils to be met thereby, it

is my conclusion that the Legislature intended by Act No. 157 only to limit the expenditure of the taxes levied by Schedule 156.1. I do not find in Act No. 157 a clear intention to repeal the specific mandate of Schedule 138.9 of the Revenue Law of 1935, requiring the proceeds of the tax on lubricating oil to be paid into the General Fund of the State Treasury. It is, therefore, my opinion and I advise you that the revenue obtained from the tax on lubricating oil under Schedule 138 of the Revenue Act of 1935 must be paid into the State Treasury to the credit of the General Fund of the State and should not be paid into the State Highway Department.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 20, 1937.

Hon. Watkins M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

County Funds—Court of County Revenues of Dallas County does not have authority to make a donation to the annual horse show for prizes, the proceeds of which show are to be used for the crippled children.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"The Kiwanis Club of Selma has an annual horse show for the benefit of crippled children. The Club has made application to the Court of County Revenues for an annual donation for prizes. They justify this request on the ground that it is in the nature of a fair and that it is for encouraging the growing of live stock etc. etc., and is done without profit to anyone.

"Please advise whether in your judgment this could be done legally."

I regret to advise that I have been unable to find any authority for the Court of County Revenues of Dallas County to make a donation to the annual horse show for prizes, the proceeds of which show are to be used for the benefit of the crippled children.

"Public funds can never be expended unless there is expressed or necessarily implied authority for the expenditure." Quarterly Report of Attorney General, Vol. 1, p. 304; Biennial Report of Attorney General, 1928-1930, pp. 826, 981.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 20, 1937.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Statutes—Act No. 649, General Acts of 1919, page 899, approved September 29, 1919, held constitutional and valid.

2. Said Act held not repealed by any subsequent legislative act.

3. Comptroller held to have authority to pay the amount appropriated by said Act under the authority contained therein, out of any funds in the State Treasury not otherwise appropriated.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 12, 1937, which is as follows:

"On October 23, Dr. John W. Abercrombie made a requisition for the payment of $2,931.55 appropriated for his relief under Act approved September 29, 1919, page 899 of the Acts of 1919.

"Please advise me if I have authority to pay this amount under said Act.

"Dr. Abercrombie contends that he is entitled to this amount under the decision of the Supreme Court in the case of the Southern Industrial Institute vs. Chas. W. Lee, State Comptroller.

"I am attaching hereto the complete file in the matter."

The legislative act appropriating $2,931.55 for the relief of Dr. John W. Abercrombie, and on which he bases his requisition on you for payment of said amount, is Act No. 649, General Acts of 1919, page 899, approved September 29, 1919. The said act reads as follows:

"No. 649. To make an appropriation for the relief of John W. Abercrombie.

"Be it enacted by the Legislature of Alabama:

"Section 1. That the sum of two thousand nine hundred thirty-one dollars and fifty-five cents, ($2,931.55), be and the same hereby is appropriated from any funds in the Treasury, not otherwise appropriated, for the relief of John W. Abercrombie, to reimburse him for the sum of $2,931.55 paid by him to the State to cover defalcations of his Chief Clerk while superintendent of education.

"Section 2. That the said amount of two thousand nine hundred thirty-one dollars and fifty-five cents ($2,931.55) shall be paid by the State Treasurer on warrant to be drawn by the State Auditor upon the passage and approval of this Act.

"Approved September 29, 1919."

The history of the circumstances giving rise to the passage of this said act for Dr. Abercrombie's relief by the Legislature of 1919, gathered from the official records of the State, the file furnished us by you along with your request, and other information made available to this office, may be stated briefly as follows:

Dr. Abercrombie served as State Superintendent of Education of Alabama from December 1, 1898 to July 1, 1902, during which time one Harry C. Gunnels served in the Department of Education as a clerk, without bond, having been appointed by Dr. Abercrombie pursuant to the authority conferred upon by him by Section 3545 of the Code of Alabama, 1896, which said Code Section did not require the said clerk to give bond and did not make the State Superintendent of Education responsible for his defaults and misfeasances. Gunnels served in the capacity of Chief Clerk, and in such capacity, as had long been the custom, had charge of the clerical work of the Department, including the work pertaining to the lease and sale of school lands, known as sixteenth-section lands. At the time of his appointment as Chief Clerk in the office of the State Superintendent of Education, Gunnels was Superintendent of the Public Schools of Anniston, Alabama. He was a graduate of two colleges and had been admitted to the Bar of the State of Alabama. He was generally recognized as a man of good habits, of exceptional ability, and of high character. Dr. Abercrombie supervised the work of his Chief Clerk regularly and carefully, and when he retired from office, he requested the then Governor to have the records of the Department of Education examined by the then Examiner of Public Accounts, the officer provided by law for such purpose. The then Governor complied with his request, and the examiner assigned to make the said examination reported that the records of the Department of Education had been correctly kept. In November, 1912, more than ten years after the retirement of Dr. Abercrombie from the office of State Superintendent of Education, the then Examiner of Public Accounts, Hon. Chas. E. McCall, the Chief Examiner, after a re-examination of the records, discovered and reported that the said Gunnels had, as Chief Clerk, misappropriated $2,931.55 of school land monies during the administration of Dr. Abercrombie. The said report completely exonerated Dr. Abercrombie and contained no intimation that he had been negligent in the appointment of the said Gunnels or in the supervision of his work as Chief Clerk. The report stated in part: "From all letters, records, and evidences of payment by purchasers of lands, as well as correspondence had with them from the office of Superintendent of Education, it appears that all transactions with regard to sale of 16th section lands were had and done through Hon. H. C. Gunnels in his capacity as Chief Clerk." During the said re-examination which disclosed his defalcations, Gunnels died. Whereupon, the then Governor called upon Dr. Abercrombie to replace the amount misappropriated by his Chief Clerk, which Dr. Abercrombie did replace, notwithstanding his insistence that there was no legal liability or moral obligation upon his part to do so, the payment by Dr. Abercrombie of this amount being made under protest and with notice at the time of the payment thereof that he would bring the matter to the attention of the legislature, with a request for reimbursement. The matter was not brought to the attention of the attention of the Legislature of 1915, which was the next legislature to meet after the payment of the said amount by Dr. Abercrombie, for the reason that a similar case, a case involving the same points of law and similar facts, the case of **State v. Kolb,** 201 Ala. 432, was pending in the courts of the State. The Legislature of 1919, upon having this matter brought to its attention, passed the act which is set out in full hereinabove.

The first question presented for determination by your inquiry is whether or not this said act violates any provision of the Constitution. I am of the opinion that the said act is not violative of any constitutional provision. If Dr. Abercrombie was not negligent in appointing the said Gunnels, and was not negligent in supervising his work as Chief Clerk, he was not liable for his defaults or misfeasances, even though he was appointed by him and under his control, in the absence of a special statute or law making him so liable. That such is the law is made very clear by the decision of the

Supreme Court of Alabama in the case of **State v. Kolb,** supra, which was decided by the Supreme Court of Alabama in 1918. We quote as follows from the opinion in this case, written by Mr. Justice Mayfield:

> "The general proposition that an officer is not liable for the defaults and misfeasances of his clerks or assistants, even though they are appointed by him and are under his control, in the absence of allegation and proof that the officer was negligent or at fault in failing to exercise proper care and prudence in selecting the assistant or clerk, or in failing to properly supervise and superintend the acts and services of such employee in the work for which he was so selected, the doing, or failure to do which caused the loss or injury or damage, is well settled. In such cases, in the absence of a special statute or law to the contrary, the assistant or clerk, and his bondsmen if any he have, are liable, but not the officer or his bondsmen. This has been repeatedly decided by this and most other courts. See the case of Raisler v. Oliver & Co., 97 Ala. 710, 12 South. 238, 38 Am. St. Rep. 213, where the authorities are collected and cited, and 31 Cyc. pp. 980-984, and note, also collecting the authorities. Of course, for this rule to apply, the law must authorize the appointment of such clerk or assistant, so that by virtue of the law and of the appointment the clerk or assistant became in a sense an officer himself."

There was no statute of the State of Alabama in effect at the time making the State Superintendent of Education liable for the defaults or misfeasances of his assistants. The legislature evidently found, and the facts and circumstances of the situation, as related above, seem to warrant such a finding, that Dr. Abercrombie was not negligent in appointing the said Gunnels as his Chief Clerk and that he was not negligent in supervising his work as Chief Clerk and that, therefore, there was a moral obligation upon the State to reimubrse Dr. Abercrombie for the amount of money which he had paid into the State Treasury in the manner detailed above, for the legislature authorized this to be done by the said act for Dr. Abercrombie's relief. This the legislature had the power and authority to do so. The Supreme Court has held that an appropriation made in the discharge of a moral obligation upon the State must be regarded as being for a public purpose and within the constitutional power of the legislature, and the fact that a private person may receive the benefit of such an appropriation does not constitute the act of appropriation a private one. **State v. Clements, et al.,** 220 Ala. 515, 126 So. 162, and cases therein cited.

Therefore, it is my opinion that the said Act for the relief of Dr. Abercrombie is constitutional and valid.

The next question presented for determination by your inquiry is whether or not the said act, if constitutonal and valid, has been repealed by any subsequent legislative act. It is my opinion that it has not, but that, the appropriation made thereby not having been paid the said act is still in full force and effect. If the said act has been repealed by any subsequent legislative act, it was repealed by the provisions of the so-called Budget and Financial Control Act, Act No. 37, General Acts 1932, page 35, approved September 27, 1932. That the provisions of the said Budget and Financial Control Act did not repeal the said act for the relief of Dr. Abercrombie or the appropriation made to him thereby seems very clear from the holding of the Supreme Court of Alabama in the very recent case of **Southern Industrial Institute v. Chas. W. Lee, Comptroller of the State of Alabama,** 175 So. 365. The appropriation under consideration in that case, which the Supreme Court held not to be repealed by the provisions of the Budget and Financial Control Act, was an appropriation to the Southern Industrial Institute for the

specific purpose of erecting buildings. Sacrificing brevity for clearness, we here quote at length from the decision of the Supreme Court, written by Mr. Justice Gardner, in the Southern Industrial Institute case:

"In 1927 (Generals Acts 1927, p. 506), the Legislature appropriated the sum of $50,000 for the construction and equipment of buildings for the Southern Industrial Institute at Camp Hill, Ala., an educational institution incorporated by special act. General Acts 1900-01, p. 848. The appropriation was made available only upon approval of the Governor, and subject to his judgment as to the condition of the treasury.

"Following the approval of the act and on December 3, 1929, the Governor, the petition avers, wrote the president of the Institute (to so designate it for brevity) to the effect that he had every reason to say about $25,000 of this appropriation would be released sometime, near the 15th of January. Thereupon the Institute let a contract for the construction of a new administration building; the walls being erected and a temporary roof completed before the enactment of what is known as the Budget and Financial Control Act. General Acts (Ex. Sess.) 1932, p. 35.

"During the construction the sum of $10,000 of the appropriation was released by the Governor, and applied on the cost of construction. The Institute, in reliance upon the letter of the Governor, to which reference has been made, advanced from its general funds, which would otherwise have been used in the payment of salaries of its teachers and other general expenses in the education of its pupils, the additional sum of $16,300.

"The petition discloses that the remaining sum of the appropriation is needed, and has never been paid, but the Governor has approved the request for $5, with the evident intent of permitting the Institute to test in the courts the validity of the remainder of this appropriation.

"The state insists the appropriation was repealed by the Budget Act, cited above, and places reliance upon section 10 of the act, which reads as follows:

"'Repeal of Definite, Indefinite and Contingent Permanent Appropriations: All permanent appropriations, definite, indefinite, and contingent in amount, except those provided in the Constitution and those provided in existing statutes in payment of interest on indebtedness arising out of the disposition of lands donated to State institutions by the Federal Congress, heretofore made to any department, institution, bureau, board, commission or other State agency, are hereby repealed as of the close of the fiscal year ending September 30, 1932; Provided that this section shall not become effective until the Legislature enacts current annual appropriations, including per capita appropriations for all eleemosynary and correctional institutions and the Alabama School for Deaf and Blind, for definite amounts that may be expended (after allotments by the Governor as provided for in Section 20) by such departments, institutions, bureaus, boards, commissions and other State agencies for the three remaining fiscal years of the current quadrennium ending on the 30th day of September, 1933, 1934, and 1935.'

"The Institute lays stress upon the word 'permanent,' preceding and qualifying the word appropriations, and argues that this particular appropriation to the Institute was not a permanent appropriation within the meaning of said section 10, and is therefore not repealed. We think there is merit in this contention.

"(1, 2) We are acquainted, as a matter of common knowledge, with the history of the Budget Act, the large outstanding floating debt of the state, the insufficiency of funds in the treasury, and appropriations far in excess of the state's revenues. The act was designed to make the state operate within its income. To that end, there was vested in the Governor direct and effective supervision over all of the state's financial affairs. See section 2 of the act, and Abramson v. Hard, 229 Ala. 2, 155 So. 590.

"The appropriation here in question is in harmony with that theory, as its release is wholly dependent upon the will of the Governor, who, under the Budget Act, has direct supervision over the state's finances.

"The word 'permanent' has a well-defined meaning as follows: 'Continuing in the same state or without essential change; durable, fixed, stable; opposed to temporary.' The Standard Dictionary and Webster's New International Dictionary (2d Ed., unabridged). The word 'continuing,' in the above definition, indicates such character of continuing appropriation referred to in 59 Corpus Juris, 257; and the reference in this same section to current annual appropriations adds some force to this suggestion.

"Perhaps analogous illustration is to be found in Pierce v. City of Huntsville, 185 Ala. 490, 64 So. 301, 304, followed in Holley v. Brunson, 221 Ala. 572, 130 So. 173, wherein paving ordinances were considered in reference to the general statute requiring certain formalities as to the passage of ordinances of permanent operation. The holding was that the paving ordinances were not embraces therein, for the reason it was merely local and special, and when its end is once accomplished, it is no longer a rule of conduct, but 'its interest is historical and evidential only,' the opinion concluding: 'It is then consigned to the limbo of things which have served their purpose.'

"So it is in the instant case. The appropriation is local and special—the erection of a building—and when the building is completed and the payment made, the act is at an end. It has served its purpose and becomes 'historical and evidential only.'

"(3,4) There is nothing in the act to indicate that the lawmakers did not intend the word 'permanent' to be given its ordinary and usual meaning (State v. Praetorians, 226 Ala. 259, 146 So. 411), and the courts have no right to ignore the express language used, but should construe the whole act, and each clause as standing in pari materia (Wages v. State, 225 Ala. 2, 141 So. 707; 18 Alabama Digest Statutes, p. 125; 59 Corpus Juris, 993). In Michael v. State, 163 Ala. 425, 50 So. 929, 933, the court quoted approvingly the statement that 'generally speaking, a permanent statutes * * * is one which is understood to continue in force till its repeal'

"The act in question is not of that character. When it has served its purpose, it is at an end without further legislative action.

"(5) Whether the setting of section 22 in the act could be taken as indicating an intention that its provisions should have reference to future appropriations only, as held in the court below, we need not stop to inquire, as we entertain the view the appropriation act in question was not a 'permanent' one within the meaning of section 10, and, therefore, was not repealed. * * *

"We therefore conclude that the appropriation for the erection of buildings for the Institute was not a permanent appropriation within

the meaning of section 10 of the Budget Act, and was of consequence not repealed, but is yet in full force and effect. * * *"

The principles of law enunciated by the Supreme Court in the decision above quoted form are applicable to the said Act for the relief of Dr. Abercrombie. It does not make a permanent appropriation in the sense that term is used in the said Section 10 of the Budget and Financial Control Act. "The appropriation (made by the Act for the relief of Dr. Abercrombie) is local and special * * * and when * * * the payment is made, the act is at an end. It has served its purpose and becomes 'historical and evidential only' * * * When it has served its purpose it is at and end without further legislative action. * * * The appropriation act * * * was not a 'permanent' one within the meaning of Section 10, and, therefore, was not repealed."

Therefore, we conclude that this appropriation made for the relief of Dr. Abercrombie by the said Act was not a permanent appropriation within the meaning of Section 10 of the Budget and Financial Control Act and that the said Act was not repealed thereby, but is still in full force and effect.

Since Dr. Abercrombie has not been paid the monies appropriated to him by the Legislature through the said Act, as is evidenced by the official records of the State of Alabama and Dr. Abercrombie's affidavit, which is attached to the file in connection with this matter furnished this office by you, and since the said act is constitutional and valid, and has not been repealed by any subsequent legislative act, but is still in full force and effect, it is my opinion that you have the authority to pay to Dr. Abercrombie the amount appropriated to him by said act, pursuant to the authority contained therein. This should be done as soon as there are funds available in the State Treasury not otherwise appropriated for the payment of the same. Compare opinion of the Attorney General to you under date of August 19, 1937, Quarterly Report of the Attorney General, Vol. VIII, page 164.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 20, 1937

Hon. Roy L. Smith,
Attorney for County Commission,
Russell County,
Phenix City, Alabama.

Counties—Expense of condemnation and attorney's fees for bringing condemnation proceedings and acquiring rights of way for public roads may be paid out of gasoline tax.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of December 8, 1937, which is as follows:

"On January 29, 1936, you advised Hon. J. Percy Oliver, Judge of Probate of Tallapoosa County, that payment for rights-of-way for public roads in said County could be made out of the funds derived from Gasoline Tax collected by the State and paid over to the County. (See Volume

II page 82, Attorney General's opinion, period from January 1, through March 31, 1936).

"Please advise whether or not Russell County can pay the expense of condemnation and Attorney's fee for bringing condemnation proceedings and acquiring rights-of-way for public roads out of the gas tax.

"Of course when rights-of-way cannot be obtained in any other manner except condemnation proceeding it seems this is a necessary part of the cost of obtaining rights-of-way and the County Commission of Russell County would like to be advised about this matter at your very earliest convenience."

In answer to your inquiry, I am of the opinion that the expenses of condemnation and attorney's fee for bringing condemnation proceedings and acquiring rights of way for public roads may be paid out of the gasoline tax.

In an opinion of this office rendered to the Judge of Probate of Tallapoosa County on January 29, 1936, (Quarterly Report of Attorney General, Vol. II, p. 82), it was held that rights of way for public roads may be paid from the gasoline fund of the county. When condemnation proceedings are necessary the expenses of such condemnation, including reasonable attorney's fees, are such necessary incidental expenses of securing the rights of way as would be considered a part of the cost thereof. Therefore, such expenses may be paid out of the gasoline tax fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

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December 20, 1937

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Tuscaloosa County—Cannot furnish gasoline to Board members—Section 5, Local Act 236, Local Acts of 1927, page 144.

Members of Board of Revenue of Tuscaloosa County not entitled to gasoline, at expense of county, for use in inspecting roads, pursuant to Local Act No. 236, supra.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter in which you request my opinion as follows:

"For several years past the Board of Revenue of Tuscaloosa County has furnished gasoline to the members of the Board of Revenue to be used in their personal cars when engaged in service for the county, particularly services dealing with the supervision and inspection of public roads and highways.

"By Acts of 1915, Local Acts, 1915, page 472, the Board of Revenue of Tuscaloosa County was created. The compensation of each member of that Board was fixed at $4.00 per day for each day's attendance upon

meetings of the Board of Revenue and five cents per mile expense in traveling from their homes to the place of meeting, provided that they could not receive over $600.00 in any one year.

"The Legislature of 1927 by Local Act, Local Acts 1927, page 143, added new and additional duties upon the members of the Board of Revenue and changed the amount and method of payment of their compensation. This Act provides that each members of the Board should receive $150.00 per month, which should be in lieu of all other compensation and expense theretofore provided for.

"In said local Act of 1927 the Board of Revenue was authorized to divide the county into three road districts and each of three members of the Board could be assigned to a separate district and was charged with the duty of making at least one inspection a month of the roads in that district and reporting their condition to the Board. There are approximately twelve hundred miles of roads in Tuscaloosa County under the supervision of the Board of Revenue of Tuscaloosa County, and formerly there was employed road supervisors whose duties were to keep the roads in good condition, inspecting the same, directing road crews where to work, etc. Due to economic conditions, the Board of Revenue of Tuscaloosa County agreed among themselves to dispense with road supervisors employed by them and agreed to perform the duties formerly entrusted to road supervisors which they have been doing for the past several years. In performing these duties it seems that the roads and bridges in Tuscaloosa County are maintained in the best possible manner and it seems that a good system of public roads is maintained in Tuscaloosa County, Alabama. They have used their own private automobiles in traveling over the roads of this county for this purpose and the gasoline consumed in such travel has been supplied by the county through its bulk plant maintained by the county as the county's expense.

"I respectfully request your opinion as to whether or not the Board of Revenue of Tuscaloosa County can legally furnish gasoline to the members of the Board of Revenue when using their own automobiles in the performance of their official duties in connection with the supervision and inspection of public roads and bridges. I would like to call your attention the cases of Densley Motor Co. v. O'Rear, 71 So. 704 and Yielding v. Ball et al, 87 So. 785, together with General Acts, 1915, page 573, Section 1, being now a part of Alabama Highway Code."

It is my opinion that the members of the Board of Revenue of your county are not entitled to receive gasoline, at the expense of the county, to be used by them in the execution of the statutory mandate, contained in Local Act 236, Local Acts 1927, page 143, to make periodical inspection of the roads.

The foregoing opinion is based upon the plain and unambiguous terms of Section 5 of the said Act, amendatory of Section 17 of Act No. 729, Local Acts of 1915, page 472, which created the Board of Revenue, said section reading as follows:

"Section 5. That Section 17 of said Act be amended so as to read as follows: Section 17: That the three members of the Board of Revenue, other than the president thereof, shall each receive a salary of not exceeding Eighteen Hundred ($1800.00) Dollars per annum, and shall not be entitled to any expenses or other compensation on account of any service rendered the county as such members of said Board. The salary shall be paid in monthly installments out of the County Treasury on certificates or warrants signed by the President of the Board. The salary of the President of the Board shall be Six Hundred ($600.00) Dol-

lars per annum, payable in monthly installments in the same manner as other members of said Board are paid."

Section 2 of Local Act No. 236, supra, requires the members of the Board of Revenue to make periodical inspection of the roads, while Section 5 thereof provides that they "shall not be entitled to **any expenses** or other compensation on account of **any service** rendered the county as such members of said Board." The present members accepted the office **cum onere** so far as expenses are concerned. Custom or practice over a period of years of furnishing gasoline to the members cannot impeach the law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

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December 20, 1937

Hon. Frank M. Stewart,
Executive Secretary,
Alabama State Milk Control Board,
601 Adams Avenue,
Montgomery, Alabama.

Alabama State Milk Control Board—Section 19, relating to fixing prices and handling charges for milk.

1. Person purchasing milk outside of Milk-Shed and distributing same to friends and neighbors inside Milk-Shed, is subject to regulation and control of Milk Board as to price.

2. Such person is subject to the provisions of subhead 2 of Section 19 and Section 23 of said "Milk Control Law."

3. Person going outside Milk-Shed and distributing milk within Milk-Shed to neighbors and friends, as mere agent or for accommodation and not as "dealer", is not within the purview of Milk Control Law", Section 19.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your request of September 18, 1937, as follows:

"Requesting under authority of Section 4 of the Alabama State Milk Control Law, approved July 9, 1935, the Alabama State Milk Control Board desires your opinion, at your earliest possible convenience, upon the following questions:

"(1) Is a person (or persons) who resides within a Milk-Shed wherein the Board has legal jurisdiction to regulate milk and the milk industry subject to the regulation and control of the Board as to price regulation where said person (or persons) goes outside of the Milk-Shed and purchases milk beyond territorial limitations of the Milk-Shed at a price less than the price fixed by the Board and brings said milk back into the said Milk-Shed and distributes it among his friends and neighbors either at the same price which he purchases it, or at a price less than the lawful minimum price fixed by the Board for the sale of such milk within the Milk-Shed?

"(2) Is such person (or persons) liable under Subsection 2 of Section 19 and Section 23 for distributing and selling such milk within the Milk-Shed at less than the lawful minimum prices established by the Board for the sale of said class of milk in the Milk-Shed?

"(3) Is such person (or persons) subject to the regulation and control of the Board and liable for the penalties set out in question No. 2, where said person (or persons) operates under an arrangement whereby he alternates at various intervals with the different neighbors and friends, whereby one such person goes outside of the Milk-Shed and gets the milk as stated above and distributes it among the rest for one day or one week, and the next day or the next week, one of the other neighbors or friends goes out and gets it and distributes it among the balance and so on, until they have rotated the trip among each one of them?"

The premises upon which the Milk Control Law is based are set out in Section 1 and are intended to be broad enough to promote, foster, and encourage the intelligent production and orderly marketing of milk commodities, including the stabilization of the marketing of such commodities. It is further based upon the expression of intent to promote the production and maintenance of an adequate supply of such products, and to this end to eliminate, so far as possible, through regulation and control, the unfair, unjust, destructive and demoralizing trade practices which have been and are now being carried on in the production, producing and distribution, sale, processing and the distribution of milk, and in the maladjustment of prices.

The legislature has set up certain provisions contained in said law, which in my opinion, were necessary and proper to render effective the purposes and determination declared. In consideration of these provisions, we are limited to the language of the law, including a reasonable construction to be placed upon said language and in pursuance of the purposes and determination as expressed by the legislature. However, we cannot exceed the express provisions further than a reasonable interpretation of the language used, having in mind the general intent of the law.

Section 5 of the Law provides for the designation of respective Milk-Sheds of the State, and the means of setting in force the provisions of the Law. Said Section reads in part as follows:

"Immediately upon such petition being filed with the Board all provisions of this act shall apply in such Milk-Shed, and shall remain in force for the life of this Act. But no provisions of this Act shall apply in any part of the State of Alabama unless and until applied for by such producers and distributors as herein provided for."

Section 6 provides that it shall be the duty of the Board "to supervise and regulate the fluid milk industry of the State of Alabama, including the production, production-distribution, transportation, manufacture, storage, distribution, delivery, processing, and sale of milk in the State." Construing the above two sections together, the powers given to the Board are confined within the limitations hereinabove quoted.

Section 9 provides for licenses to producers, producer-distributors, stores and distributors within the limitations hereinabove quoted from Section 5. The sections, further referring to said licenses from said Section 9 through Section 17, are limited by the same provisions of said Section 5. Section 18 reads in part as follows:

"This Act shall apply to every part of the State of Alabama, but shall not be construed to conflict with, or alter or repeal laws in force relating to the various Boards or departments of Health or any County or Muni-

cipality of this State, nor the sanitary code or codes in force in any County, or Municipality, or any amendment thereof duly adopted."

We do not interpret the above expression to be in conflict with the limitation as to Milk-Sheds contained in Section 5 and hereinabove quoted. It is my opinion that the phrase "Every part of the State" means every part of the State in which Milk-Sheds have been designated and placed within the Law, and does not extend the powers of the Board to areas of the State not within the Law, under Section 5, except as expressly provided or necessarily intended by the provision as to the particular matter, as for example, under Section 22, it is clearly within the power of the Board to cooperate with the agency therein mentioned in the effectuation of the purposes therein expressed, in all parts of the State, except the provisions of the Law applying to designated and "applied for" Milk-Sheds could not be exercised until the requirements of Section 5 have been met.

We must, therefore, construe Section 19, relating to orders fixing prices and handling charges for milk, in the light of the above. Said Act gives the Board power to investigate what are reasonable costs and charges for producing, hauling, processing and other services performed in respect to milk and prices for milk in the several localities and markets of the state which will protect the milk industry and insure a sufficient quantity of the same in the State. For the purposes of making effective said purposes and determinations by the Board, said Section provides specific powers to the Board in making official orders, which orders are in force and for the violation of which penalties are provided. The scope of said orders is expressly fixed by Section 19 and the power of the Board in respect thereto is limited by a reasonable construction of the provisions therein expressed.

Section 19, subhead 1, (a) reads:

"The minimum prices within the Milk-Shed to be paid by milk dealers; to producers and others for milk in its various grades and uses. The order of the Board with respect to the minimum prices to be paid to producers and others shall apply to the locality or zone in which the milk is produced, the markets in which milk so produced is sold, and may vary in different localities or zones of markets according to varying uses and different conditions."

The above quoted excerpt limits subhead (a) to minimum prices "within the Milk-Shed" to be paid by "Milk dealers." It does not apply to areas outside the Milk-Shed.

Subhead (b) reads, as follows:

"The minimum and/or maximum wholesale or retail prices to be charged for milk handled within the Milk-Shed for fluid consumption and wheresoever produced, when sold by milk dealers to consumers; by milk dealers to stores either for consumption on the premises or resale to consumers; by stores to consumers except for consumption on the premises where sold; by milk dealers to other milk dealers. A minimum wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinary efficient and economical milk dealers, including a reasonable return upon necessary investment."

The above subhead (b) relative to milk handled within the Milk-Shed for fluid consumption, is limited to sales by Milk dealers to consumers, without regard to the locality of production.

Subhead (c) is not pertinent to your request. Subhead 2 of Section 5 is as follows:

"After the Board shall have fixed prices and/or handling charges to be charged or paid for milk in any form included in the definition of milk as used in this Act whether by class, grade or use, it shall be unlawful for a milk dealer, distributor or producer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such prices, or prices as shall be applicable to the particular transaction, whether by a discount or rebate, or free service or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or comodities, or service or services when sold or offered for sale separately or otherwise."

The subhead just quoted renders it unlawful for a "milk dealer" distributor or producer to sell or buy or offer to sell or buy at prices and charges other than those fixed under authority of subheads (a), (b) and (c). It also provides against the violation of said orders under subheads (a), (b) and (c) by subterfuge, such as rebate or allowances upon other commodities and includes the phrase "or free service." It is my opinion that the term "free service" must refer to services rendered by a person, firm, association or corporation coming within the purview of those effected by subheads (a), (b) and (c). "Free Service" as there used did only relate to services by a dealer, distributor or producer as used in the first part of said subhead 2. The term did not refer to services rendered by any other person than said dealer, distributor or producer or one within the purview of subheads (a), (b) and (c).

If the person referred to in your request, under the two sets of circumstances therein stated, is such a person as can be said to be a dealer, distributor or producer or a dealer within subheads (a) and (b), in that instance he is subject to the regulation and control of the Board as to price regulations and all Acts constitute a violation of subhead 2 and renders him subject to the penalties fixed in Section 23. The determination of this question is a determination of fact in each case.

The word "dealer" is defined in Section 2 of the Law, as follows: " 'Milk dealer' means any person who purchases milk for purposes other than consumption or handles or sells milk." The word "distributor" means a person who purchases, accepts or receives milk for the purposes of putting such milk into bottles or other unit containers in which the same is designed to be sold, or for the purpose of cooling, pasteurizing, standardizing or otherwise processing such milk for fluid consumption, or for the purposes of selling, jobbing or distributing such milk at wholesale or retail, or for any two or more such purposes." I have quoted only the portion of said definitions pertinent to the questions here. The definition of "producer" clearly does not include persons such as described in your request. We do not think that the word "handle" as used in the definition of "milk dealer" means the moving of milk from place to place without such moving is for charge and constitutes a part of the distribution of milk and handling of the same from dealer to consumer. The word is used in connection with the sale of milk or the purchase of milk for sale and is used in its ordinary sense meaning to trade in, or deal in, and would include the handling, such as distribution, of milk for profit or gain, although such profit or gain were charged as service charges rather than upon the production itself. The word "dealer" does not include, in its ordinary meaning, one who buys to keep or to use or one who acts for the accommodation of another without expectation of profit or gain. 17 C. J. 1154. It is my opinion that the statutory definition of "milk dealer" in the Milk Law gives to it the commonly accepted legal meaning of the word

with reference to purchases for purposes other than consumption and as to sales of milk. It is also my opinion that the statute has extended the meaning to include any method or means of trading in, bartering or dealing in milk and also to include the distribution and handling of the same wherever charges are made for such distribution or handling, in lieu of profit or gain assessed against the commodity itself. It is my further opinion that it is immaterial as to whether or not actual profit or gain accrues from said acts, it only being necessary that said transactions are for the purpose or expectation of receiving profit therefrom.

If the person referred to in request one (1), acts as the agent of the producer from whom he secures the milk outside the Milk-Shed, he is subject to the control and regulation of the Board. If he purchases the milk upon his own account and distributes the same to friends and neighbors, he is within the law, regardless of whether he actually receives profit or gain from the transaction. If he purchases the milk from the outside producer on behalf of the group of friends and neighbors and distributes the same to them within the Milk-Shed and receives any compensation either as profit upon the product or for services rendered in the purchase, or distribution of said milk, he is within the regulation and control of the Board.

A person coming within the statements in the preceding paragraphs and selling or delivering milk at prices other than those fixed by the Board for said Milk-Shed is violating subhead 2 of Section 19 and is subject to the penalties fixed in Section 23, each day constituting a separate violation.

If such person acts without compensation in any form whatsoever and without purposes or expectation of compensation, but receives milk from one outside the Milk-Shed as the product purchases by the group represented by him, and said milk becomes the property of said group, and then delivers and distributes said product to the members of said group within the Milk-Shed, he is not subject to the regulation and control of the Board and therefore not liable as a violator of subhead 2, Section 19, and the penalties fixed by Section 23. There being no profit or gain to him and no compensation for services performed but a purely gratuitous performance, his acts do not come within the purview of subheads (a), (b) and (2) of Section 19. He is not a dealer within the definition of dealer as used in said subheads. He is a gratuitous agent. He has not bought for sale or for other purposes than consumption by those who constitute the purchaser. He has not handled milk within the meaning hereinabove given. He has no interest in the milk, in the price or in the interest of the seller. I find no prohibition in the Milk Law against an individual going outside the Milk-Shed to purchase milk at a lower price and bringing the same into the Milk-Shed for his own consumption. It is my opinion that the Act did not intend to effect such a transaction. 33 C. J. 594. When the facts are such that a group of individuals have done the same as one individual might have done and the person acting upon their behalf has become none other than an agent by accomodation, he is not subject to the regulation and control of the Board, in the performance of such acts.

The Supreme Court, in Bonds vs. State, 130 Ala. 117, 30 So. 427, and also in the case of Maples vs. State, 130 Ala. 121, 30 So. 428, said, that a conviction cannot be had for violation of the Prohibition Law against one who had no interest in the liquor sold nor in the money paid for it, and who acted only as the agent or friend of the purchaser in procuring the liquor. Of course, this condition was remedied in the Prohibition Laws by the further provisions against one aiding, etc., in an unlawful sale of liquor. In the present question, the Milk Law is in a weaker position than that of the agent or friend procuring the liquor. Certainly the friend or agent procuring the

milk is not a dealer purchasing for sale nor is he making a sale. Furthermore, it is not a violation of the law for an individual or other consumer to go outside the Milk-Shed and purchase milk and bring it into the Milk-Shed for consumption. Lastly, it is my opinion that his mere handling of the milk without charge and not included in the making of any sale as a part thereof, is not handling milk within the definition of "milk dealer." If so, the conclusion follows that any one physically handling milk within the Milk-Shed becomes a "milk dealer." Such a meaning was not intended.

Therefore, it is my opinion that a person, being a member of a group of persons who alternate among themselves in going outside the Milk-Shed and purchasing milk for their consumption within the Milk-Shed, and distributes the milk among themselves for one day or one week, is not a dealer or distributor within the definitions of the Law and is not controlled or regulated by the Board. I appreciate that such a practice might in some instances tend to interfere with the most satisfactory operation of the Board program, but we cannot extend by interpretation the operation of the Law as expressed by the legislature, other than by a reasonable interpretation thereof.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

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December 20, 1937

Hon. Sam A. Williams, Secretary,
Alabama State Board of Pharmacy,
Troy, Alabama.

Pharmacist—Under Section 21½ of Act No. 332, S. 136, approved July 1, 1931, (General Acts 1931, p. 377), which Act regulates practice of Pharmacy in Alabama, a physician may form a partnership with another to own and operate a drug store.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of December 2, 1937, which is as follows:

"As Secretary of the Alabama State Board of Pharmacy, I will appreciate it very much if you will give me an official opinion regarding Section 21½ of the Pharmacy Act of 1931.

"Does this section permit a physician forming a partnership with some person not a physician or pharmacist and operating a drug store or does it mean that the physician must be sole owner and manager of the store?"

Section 21½ of Act No. 332, S. 136, approved July 1, 1931, (General Acts 1931, p. 377) provides as follows:

"Section 21½. Provided however that the provisions of this bill will not prevent any Legally Licensed, Medical Doctor from owning or operating a drug store provided that said medical Doctor fill only his own prescriptions and not do a general prescription business."

In my opinion said section permits a physician to form a partnership with one who is not a physician or pharmacist, to own or operate a drug store, provided the physician fill only his own prescriptions and not do a general prescription business.

It will be noted that if a legally licensed medical doctor either owns or operates a drug store, such doctor is relieved of complying with the provisions of the Act. The alternative is used. The physician may either own or operate the drug store. As long as he acts in either capacity the requirements of the statute will be satisfied.

Therefore, the physician may form a partnership with another, who may not be a physician or pharmacist, if the physician either himself owns the drug store or himself operates it. As above stated, such a drug store is not authorized to do a general prescription business, but the physician may fill his own prescriptions.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 20, 1937

Hon. George A. Sossaman,
Attorney for Mobile County,
Mobile, Alabama.

Inferior Criminal Court of Mobile County—Payment of substitute judge acting for regular judge who is sick. Such sum is deducted from salary of regular judge unless regular judge, upon his recovery, file certain affidavit with county treasurer.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of December 9, 1937, which is as follows:

"I am directed by the Board of Revenue and Road Commissioners to ask you the following question:

"Under the provisions of Section 3 of the Act of the Legislature of 1907 page 82 creating the Inferior Criminal Court of Mobile County, is it or not the proper procedure for the judge to deduct the sum paid for a substitute judge from his regular salary until such time as he shall recover his health and file a certificate of such recovery?"

Section 3 of the Act above referred to provides for the appointment of a special judge for the Inferior Criminal Court of Mobile County when the regular judge is incapacitated by reason of sickness or otherwise. It provides for the manner of the appointment, taking the oath of office, etc. The pertinent part of said section as regards your inquiry is as follows:

"Such judge pro tem shall receive as compensation for his services during the time the regular judge of said court is incapacitated by law, sickness or other act of Providence, the sum of ten dollars per day for each day he is actually engaged in holding such court, to be paid out of the treasury of Mobile County upon a certificate issued by the clerk of said inferior criminal court, setting forth the number of days that the

judge pro tem was actually engaged in holding court, **which amount paid to the judge pro tem, in case of sickness of the regular judge, shall be deducted from the salary of said judge unless he shall, upon his recovery, file with the treasurer of Mobile county an affidavit of some reputable physician that he was during such sickness, physically unable to discharge his duties as judge of said court."** (Emphasis supplied)

It will be seen from the above that in case of sickness of the regular judge the amount paid the special judge shall be deducted from the salary of the regular judge **unless** he shall, upon his recovery, file with the Treasurer of Mobile County a certain affidavit. Since the affidavit is not filed until recovery, the amount deducted cannot be paid the regular judge until that time. In my judgment, the proper procedure to follow would be to deduct the amount paid the special judge from the monthly salary of the regular judge if the affidavit had not been filed by any one pay day; and when the affidavit is filed to then pay the regular judge the amount so deducted. It is the clear intent of the the statute that the regular judge does not lose any compensation if he files the necessary affidavit.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 28, 1937

Hon. Gaston Scott, President
State Highway Commission
CAPITOL.

Public Highways—Utilities Companies who have secured Right of Way under Section 7020, Code of 1923, have the right to cut down such trees as might by falling injure such lines.

Where the right of way was secured under either Section 1357 or Section 7197, Code of 1923, Utilities Companies right to remove trees from State Road Rights of way is subject to the control of the Court of County Commissioners, Board of Revenue, or other governing body of the County, except in cases where the State Highway Commission has jurisdiction, who will then exercise such control.

Utilities Companies who damage or mutilate trees beyond the necessity of a reasonable enjoyment of their easement are liable in damages to adjoining property owners who own the fee.

Opinion by Assistant Attorney General Park.

Dear Sir:

I have your request for an opinion as follows:

"The Highway Department in its Three Way Program and other jobs is arranging for the removal of quite a number of telephone and power poles. It has always been the purpose and practice of this Department to preserve trees along the rights of way whenever possible; however, we have been very materially interfered with in this most worth while practice by the telephone and power companies claiming the right to clear the right of way and in some cases property owners have told us that telephone and power crews stated that 'the Highway Department gave them the right to cut the trees.'

"What authority have the telephone and power companies to cut the trees on the rights of way of State Roads? Is it necessary for said power and telephone companies to secure permission of the property owners even if the trees are on our right of way? Is it necessary for said power and telephone companies to secure permission of the State Highway Department before cutting or removing trees along our rights of way?"

The statutes of this State outline the manner in which right of way may be secured to string the telephone and telegraph lines along public roads. If such right is secured under Section 7020 of the 1923 Code, which may be done only after proper condemnation proceedings, by special provisions of the statute, this right carries with it the privilege to cut down such trees as might by falling injure such lines. However, even under this section it would appear that the telephone and power companies would not be permitted to act arbitrarily and do unnecessary damage to trees along the right of way.

If the right of way is secured under Section 1357 or Section 7197 of the 1923 Code it would appear that the telephone and power companies would have the right to remove such trees as would interfere with the proper exercise of the privilege conferred. However, this is not an absolute right, and is subject to the limitation that it shall be exercised under the control of either the Court of County Commissioners of the County in which the right of way is situated, or in instances where the highway is under the control of the State Highway Department, then subject to the control of that department.

As to the right of abutting property owners it has been held in the case of the **Western Railway of Alabama vs. The Alabama Grand Trunk Railroad Company,** 96 Ala. 273, that: "The fee in land comprising a road dedicated as a public way remains in the owner of the land abutting on the road, subject to such burden or easement in favor of the public as were conferred by the act of dedication."

While it has been held by a long line of Alabama cases that the stringing of telephone and telegraph wires along a public road is not an additional servitude for which an abutting property owner is entitled to additional compensation. **See Hobb vs. Long Distance Telephone and Telegraph Company,** 147 Ala. 393, 41 So. 1003; **City of Mobile vs. McClure,** 221 Ala. 51, 151 So. 832; also, **Crawford vs. Alabama Power Company,** 221 Ala. 226, 128 So. 454, nevertheless, it has also been held in a long line of cases that the owner of land over which a highway passes has a right to plant trees by the road side, in a manner not obstructing travel and they cannot be lawfully injured or destroyed either by private individuals or the public authorities when no necessity exists therefor. **Welman vs. Dickey,** 78 Maine 26, 2 Atl. 133; **Bliss vs. Ball,** 99 Mass. 597; **Groves vs. Shattuck,** 35 N. H. 257, 69 Am. Dec. 536. Where such unnecessary damage is done to the trees the abutting property owner is entitled to adequate compensation. **Hobbs vs. Long Distance Telephone and Telegraph Company,** supra.

In view of the foregoing, I am of the opinion that except in instances where the rights of way have been conferred under Section 7020, Code of 1923, the Utilities Companies must construct their lines under the control of either the Court of County Commissioners or the State Highway Department, in each case the control being exercised by the governing body having control of the paritcular State Road under consideration.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 29, 1937

Hon. Harry Simon, Chief Clerk,
State Tax Commission,
CAPITOL.

License Tax—Schedule 137, Alabama Revenue Laws, approved July 10, 1935. The state taxing authorities cannot impose license levied by Schedule 137 on General Agents, Traveling Freight Agents or Brokers, soliciting business exclusively for railroads situated without this state. Soliciting freight agents or brokers are not liable for their license levied under Schedule 137 for soliciting the transportation of freight or passengers, either or both, from points within the State of Alabama to points in other states provided that such solicitation is confined exclusively to businesses engaged in interstate commerce.

Rule applies to both agents or brokers compensated by salary or commission.

Opinion by Assistant Attorney General Park.

Dear Sir:

I have your request for opinion as follows:

"Under the following statement of facts your opinion is requested as to whether or not the general agent or the traveling freight agent (of a railroad which does not operate its lines in Alabama) who solicits freight and passenger traffic in the state over the roads which they represent is liable for the payment of the license levied by Schedule 137, to wit:

"Any person engaged in the management of business matters, occurring between the owners of vessels, railroads, airplanes, motor vehicles and express companies and the shippers or consignors of the freight and the passengers which they carry, shall be deemed a "SOLICITING BROKER" for the purpose of this schedule. Every person shall pay for this privilege of transacting such business, Fifty Dollars ($50.00),'

"Such agents do not collect payments for transportation of freight nor do they receive or deliver shipments nor do they have authority to sell tickets; said agents connections direct or indirect has no connection with domestic commerce between two or more places within this state and such business transactions are presumed to relate solely to interstate commerce. Such agents employment is limited exclusively to inducing persons in this state to travel or ship over the lines which they represent through other states.

"Also give us your opinion as to whether or not a soliciting agent who solicits the transportation of freight and passengers, either or both, from points within Alabama to points in other states, would be liable for license under said Schedule.

"Under this last question such agent may operate in one or two of the following manners:

"First: As an employee on a salary basis from such transportation company;

"Second: As an agent whose compensation is on a brokerage or commission basis.

"136 U. S. 104, 34 L. Ed. 391 (1890)

264 U. S. 150, 68 L. Ed. 611

185 U. S. 27, 46 L. Ed. 785

153 U. S. 287, 38 L. Ed. 719

273 U. S. 34, 71 L. Ed. 524."

It is my opinion that Schedule 137 of Alabama Revenue Laws, approved July 10, 1935, has no application to one engaged exclusively in soliciting business for non-resident transportation companies whose lines do not extend into this state, neither does this Schedule apply to those who are engaged exclusively in soliciting business to be transported from points within Alabama to points in other states, in other words, "business involving interstate commerce." To apply this Schedule in such transactions would be an invasion of the commerce clause of the Constitution, and the United States Supreme Court, in a long line of cases has repeatedly nullified efforts on the part of states and municipalities to levy license taxes on soliciting agents representing non-resident principals for the privilege of soliciting business to be shipped to persons within the state. See Brown vs. Maryland, 12 Western 419; Weldon vs. Mo., 91 U. S. 275; Robbins vs. Shelby Tax District 120 U. S. 489; Stockard vs. Morgan, 185 U. S. 27; Stratford vs. City Council of Mobile, 619 20 So. 127.

It has also been held in the case of McCall vs. California, 136 U. S. 104 that a license tax cannot be collected from those engaged in soliciting business to be transported to points outside of the state. In this particular case the State of California attempted to impose a license tax on soliciting passenger agents who confined their activities exclusively to attracting prospective travelers to points without the state to travel over their respective lines.

Nor does it matter whether the party sought to be taxed is an employee on a salary basis, or a broker on a commission basis representing several different concerns engaged in interstate commerce. A very strong case on this point is the Texas Transport and Terminal Corporation vs. the City of New Orleans, 264 U. S. 150, 68 L. Ed. 611, in which the United States Supreme Court held that a corporation employed as Agent by owners of vessels engaged exclusively in interstate and foreign commerce, where its business is confined to, and is a necessary adjunct of their commerce, could not be compelled to pay a license tax for the privilege of conducting such business. See also Di Danta vs. Penn., 273 U. S. 34.

However, if such agents or brokers are engaged in general solicitation of both intra-state and inter-state business in such manner as to make it impossible to separate and distinguish between the two, Schedule 137, in such cases, would be applicable.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 29, 1937

Hon. M. L. Gilbert, Chairman,
Board of Registers,
DeKalb County,
Grove Oak, Alabama.

Elections — Registration — CCC boys stationed in a county of Alabama and whose residences were formerly in other counties of Alabama or other states, held not entitled to register by the mere fact of being stationed in a county of Alabama.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of November 17, 1937, requesting my opinion as follows:

"We have stationed in this county several CCC boys whose homes are in other counties and states. Are these boys entitled to register as voters in this county after they have been here the proper length of time? These boys are single and their homes are in the various counties of this and other states.

"I will thank you to let me have an opinion on this matter at an early date."

In reply, I wish to advise you that the answer to your question must be conditioned upon each separate statement of facts arising in the case of each separate individual concerned. I wish to refer you to section 366, Code of 1923, which provides as follows:

"RESIDENCE NOT ACQUIRED OR LOST BY TEMPORARY ABSENCE.—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state."

I wish to call your particular attention to the clause "or by being absent from his or her place of residence in the civil or military service of the state, or the United States;". In my opinion, boys who are stationed in CCC Camps and whose residences are in other counties and states, but who are of legal age to register and become qualified voters in the county in which they are stationed, may do so only by meeting the requirements for acquiring residence which must depend upon intention of the particular individual. The question of legal residence must necessarily depend to a great extent upon the intention of the person claiming such residence. I refer you to the case of **Pope v. Howle, Allen v. Cooper,** 149 So. 222, in which the court said:

"(7, 8) The effect of these cases may be thus stated: When the fact of the legal residence of a citizen is once established, such fact of residence is presumed to continue, and this presumption prevails until it is established by the evidence that he has elected to or has established a residence at or in another place. It may further be stated that,

while the determination of the place of legal residence of a citizen presents a question of fact, yet in determining that fact, the intention of the citizen is entitled to and must be given due consideration in connection with his relevant acts. It is this combined result of intention and acts—speaking for the voter of his actual domicile, official residence as a citizen and as an elector seeking to cast his vote—that determines the right to vote in such precinct.

"It is this combined result of intention and acts—speaking for the voter of his actual domicile, official residence as a citizen and as an elector seeking to cast his vote."

See also the case of **Curry v. Bond,** 76 So. 22, 200 Ala. 256 and authorities cited therein.

In my judgment, boys stationed in CCC Camps, whose legal residences are in other counties or other states, cannot by the mere fact of being so stationed acquire residence for voting purposes. The law requires two years residence in the State and one year in the county next preceding the next general election, for the purposes of registering and voting. I refer you to Section 178 of the Constitution and Sections 361 and 381 of the Code of 1923. Also see **Shepherd v. Sartain,** 64 So. 57, and authorities cited therein.

The question then becomes one of fact as well as of law. It must be shown in the instant case that these young men not only have met the legal requirements of age and period of residence, but in my judgment it must further be shown that each individual has met the requirements of "intention" in order to claim such residence. In my judgment, sufficient proof of his intention to become a citizen of Alabama and of the county in which he wishes to vote coupled with overt acts, tending to confirm that intention, and the fact that the applicant at the date of the next general election will have the legal requirements of residence outlined, supra, should be offered to the Board of Registrars before he should be permitted to register.

In my judgment, the mere fact that a CCC boy is stationed in a county of Alabama and whose residence was formerly in another county or another state, does not entitle said CCC boy to register and vote in said county in the absence of sufficient proof of intention to continue residence in the county in which he offers to register and vote coupled with full compliance with other requirements of the law.

I wish to refer you to Quarterly Report of Attorney General, Volume II, period of January 1, 1936 through March 31, 1936, p. 86, to an opinion rendered to the Mobile County Board of Registrars, Mobile, Alabama, under date of January 31, 1936.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 29, 1937

Hon. Page S. Bunker,
State Forester,
CAPITOL.

State Parks—Provision for disposition of receipts accruing from operation of State Parks, under Act No. 377, General Acts 1935, page 801, is applicable only to parks acquired under authority of said act.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of December 11 which is as follows:

"In connection wtih the possible application of the provisions of the so-called Fulmer Act, Public 395, 74th Congress, to the State of Alabama, the United States Department of Agriculture has raised the question as to whether the provisions of the Act of the Legislature of Alabama, No. 377, General Acts of Alabama, 1935, pp. 801-802, may prevent the State from accepting the benefits of the Fulmer Act, a copy of which is herewith enclosed.

"The attorneys of the Department of Agriculture state that there are two possible interpretations of the intent of the Legislature:

"1. That all lands for State Forests and Parks, regardless of the manner acquired, are subject to the provisions of Act 377, and that all revenues over and above the cost of protection, maintenance and administration, must be placed in the general fund to liquidate the acquisition appropriation.

"2. That the provisions of Act 377 requiring deposit of revenues over and above the stated items into the Treasury applies only to those lands purchased out of the money appropriated by said Act.

"It will be appreciated if you will furnish the State Commission of Forestry with your opinion as to which of the above two interpretations, if either, should prevail."

In my opinion your second interpretation is correct. Section 1 of Act No. 377 is as follows:

"Section 1. That out of any funds of the State Treasury not otherwise appropriated there is hereby appropriated for the acquisition of lands by the State Commission of Forestry for the purposes of State Forests and State Parks, by purchase or by condemnation, the sum of twenty-five thousand dollars for each year of the quadrennium beginning October 1, 1935; provided that all receipts accruing from the operation of **said** forests and parks, over and above the actual costs of protection, maintenance and administration, shall be deposited in the Treasury to the credit of the general fund for the purpose of liquidating the appropriation herein made."

You will note the wording "* * * receipts accruing from the operation of said forests and parks." In my opinion the word "said" refers to the forests and parks previously mentioned in the same section.

I fail to see that Act No. 377 has any bearing on the Fulmer Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 29, 1937

Hon. A. D. Martin,
Tax Assessor,
Chilton County,
Clanton, Alabama.

Taxation—Overlapping exemptions to insane persons — Section 2(f)—General Acts of 1935 (H. B. 324, General Acts 1935, page 256) page 258, and Act 107, Acts 1936-37, page 113.

Method of computing homestead and other real property exemptions to an insane person.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

Reference is made to your letter which is quoted as follows:

"I would like to submit for your opinion the following question:

"Under sub-division F of Section 2 of the Revenue Code of 1935, the property of an insane person is exempt from Ad Valorem taxation to the extent of $2,000.00, which, as I understand, has been construed to mean by your office actual value of $2,000.00 or $1200.00 assessed value. In an opinion of the Attorney General to John J. Flowers and dated July 6, 1937, your office held that the homestead exemption is in addition to exemption to deaf mutes, insane and blind persons, as provided by the Section just quoted.

"An insane property owner listed for taxation 167 acres and has claimed homestead exemptions on 119 acres the assessed value being $1104.00 on this 119 acres. This leaves 48 acres valued at $396.00 assessed valuation. This taxpayer, of course, is entitled to an exemption of $1200.00 assessed value on account of his insanity, and has benefitted only to the extent of $369.00, and it will appear therefore, that he lacks $804.00 assessed valuation of getting his full $1200.00 valuation exemption, and the question is whether or not I will be permitted to grant any further exemptions out of his homestead, to make up this deficiency.

"To state the proposition a little more particular, Chilton County's tax rate is $2.00 per hundred and the taxes on the 119 acres assessed at $1104.00, is $22.08; 65c of this $2.00 is exempt under the homestead laws of $7.18, leaving him liable for $14.90 on the 119 acres. As to the remaining 48 acres the assessed value is $396.00 and under the insane exemption law all of this is exempt to the taxpayer. It appears, therefore, that the taxpayer would only receive an exemption in taxes of $7.95 under the insane exemption law, whereas, he is entitled to $24.00 according to our tax rate, provided he has that much property and the question is whether or not this difference between $24.00 and $7.92 can be granted to him out of his homestead of 119 acres. If you hold that this can be done then I would like for you to give me some idea as to how this should be figured."

Construing Section 2(f) of the Revenue Act of Alabama, reported in the General Acts of Alabama, 1935, page 258, granting an exemption of real property to deaf mutes, insane and blind persons to the extent of $2,000.00, and construing Act No. 107, Acts of 1936-37, page 113, granting a homestead exemption (to an insane person), this office held, in an opinion to Hon. John J. Flowers, Tax Assessor of Montgomery County, Montgomery, Alabama,

reported in Volume 8, Quarterly Report of Attorney General, page 18 that "The exemptions are cumulative and that the eligible beneficiary in Section 2(f) is entitled to a homestead exemption of $2,000.00 and a property exemption of $1200.00 on his homestead if he elects that the latter exemption be so applied."

The cumulative effect of such dual exemptions, as applicable to the property mentioned in your inquiry, is to grant the claimant an exemption of $25.95 on the total taxes of $30.00 which he owes. The exemption may be explained as follows: The exemptioner may elect to claim as exempt from state and county taxes under Section 2(f), supra, (providing exemption to an insane person) the entire tract valued at $396.00. After such exemption is granted the claimant is entitled under said Section 2(f) to additional exemption from state and county taxes of $804.00 in assessed value to complete his authorized exemption of $1200 in assessed value (Vol. III, Quarterly Report of the Attorney General, p. 67). This additional credit the exemptioner may apply to his homestead valued at $1104.00, leaving thereon an assessed value of $300.00 which is subject to exemption from State taxes **only**—amounting to $1.95. Thus it may be seen that the exemption of $1200.00 in assessed value extending to both State and county taxes, granted pursuant to Section 2(f), supra, amounts to $24.00, at the rate stated in your letter, and the exemption of $300.00 extending to the homestead, as to **state** taxes **only**, amounts to $1.95 at the lawful rate of 65c a hundred. The exemptioner is due a county tax of $4.05 on his homestead.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 29, 1937

Hon. Evan J. Owen,
Land Agent,
Gadsden, Alabama.

Taxation—Land Agents—Compensation.

Land Agent not entitled to commission on second, or later, installments on real estate redeemed on four year plan, when said land was redeemed prior to said Land Agent's tenure in office.

Opinion by Assistant Attorney General Park.

Dear Sir:

I wish to acknowledge your letter of inquiry in which you state:

"I am writing you in regard to whether or not I am entitled to a commission on the second installments on real estate redeemed on the four year plan, when these second installments have been paid through my efforts as land agent by contacting and corresponding with the parties concerned.

"I was appointed land agent October 1, 1936. However, the legislature went into session twice and of course each time this office was abolished. But when the legislature adjourned I was placed back. The parties that redeemed their property on the four year plan were parties that I contacted and had to redeem while I was land agent. However, while these

transactions were made, I was land agent on a salary basis. But on the 1st day of May, 1937, after the legislature adjourned the last time, I would not take this position on a salary basis, therefore was appointed, effective May 1, 1937, land agent on a commission basis.

"Since being appointed land agent on a commission basis I secured the second installments on some of these four year plan redemptions, and it is my opinion that these second installments would not have been paid without the efforts put out by me and my office. Therefore, I believe that I am entitled to a commission on the second installments of these redemptions when same is brought about through my efforts as commission land agent.

"Please let me have your opinion on this as soon as possible. Thanking you for past courtesies, I am, . . . . etc."

I am of the opinion that since the redemption you refer to in your letter was first made during a former term as Land Agent while employed on a salary basis, you are not entitled to the commission on the second installments on real estate redeemed on the four year plan, when such redemptions were made prior to the time you assumed your duties as Land Agent on a commission basis.

The authority for your compensation is set out in the McDermott Act (Act No. 440, Approved Sept. 13, 1935, Page 916) which provides:

"Section 1. The State Land Commissioner, with the approval of the Governor, may contract with some person or firm in each county of this State to investigate sales of real property for taxes and bid in for the State, to notify parties at interest in such real estate of such sales, to secure redemptions of said property, to secure sales of said property subject to sale at private sale by the State.

"Section 2. For such services rendered under the preceding section, the State Land Commissioner may allow fair compensation, to be fixed in the contract, which shall not exceed 10% of the proceeds of such rent, sale or redemption, and shall be paid from the funds so received."

You will note that section one sets out as quoted above, the services for which compensation shall be paid; namely, (first) to investigate sales of real property for taxes and bid in for the State; (second), to notify parties at interest in such real estate of such sales; (third) to secure redemptions of said property; (fourth) to secure sales of said property subject to sale at private sale by the State.

It may be argued that you would be entitled to a commission under the provision: "to secure redemption of said property." However, in my opinion, before you would become so entitled under this provision, you must have been instrumental in bringing about the redemption in the first instance, subsequent to your tenure of office on a commission basis, and not merely to assist in the collection of later installments.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 29, 1937

Hon. H. J. Brogden,
Judge of Probate,
Covington County,
Andalusia, Alabama.

Filing Tax—Determination of amount of tax to be paid on particular instrument offered for recordation is left to Probate Judge.

Instrument submitted held merely mortgage in absence of any fact or circumstance to the contrary coming to Probate Judge's attention.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 11, 1937, setting forth a form mortgage which has been submitted to your office for recordation. Said instrument is as follows:

"The Undersigned, of Dozier, Section ____, Township ____, Range ____ of the County of Covington, and state of Alabama, for the purpose of securing the payment of my several promissory notes (or installment note), hereinafter described payable to Taylor Tractor & Implement Company Mortgagee herein, whose postoffice address is **Montgomery, Alabama,** to-wit:

(City or Town) (State)

| | Amt. | Date of Note Mo. | Day | Year | Date Due Mo. | Day | Yr. | Amt. | Date of Note Mo. | Day | Year | Date Due Mo. | Day | Yr. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| One for | 427.00 | 10 | 7 | 36 | 10 | 1 | 37 | One for | | | | | | |
| One for | | | | | | | | One for | | | | | | |
| One for | | | | | | | | One for | | | | | | |
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| One for | | | | | | | | One for | | | | | | |

all payable at Montgomery, Alabama, with interest at no% until maturity and 8% after maturity, as stipulated therein, which notes I justly owe and hereby promise and agree to pay according to the tenor and effect thereof, do hereby grant, bargain, sell, mortgage and convey to said mortgagee, his heirs, successors and assigns, the following described property, now owned by me and in my possession upon the ____ of section ____, township ____, range ____, in ____ COUNTY, Alabama, to-wit:

One ____ Motor Truck, Model No. ____
Chassis No. ____, Engine No. ____
One F-12 Farmall Tractor, Engine No. F. S.-23193, Factory No. ____

together with all repairs, replacements of, and accessions to all of said property, including all increase of said live stock, and all wild or tame crops of every name, nature and description now growing, or hereafter planted, sown, grown, cultivated or harvested during the years 19____, 19____, 19____, 19____, upon the following described real estate now in my possession and control in the county of ____, Alabama, to wit:

.....of Section....., Township....., Range.....
.....of Section....., Township....., Range.....
.....of Section....., Township....., Range.....
loss, if any, under insurance on any of said property payable to mortgagee as his interest may appear. This mortgage is a first lien upon all the property above described .....

It is expressly agreed that on all grain and marketable crops hereinabove mortgaged, this mortgage may be foreclosed by sale thereof when harvested, in any usual or convenient market therefor, at any time, in the usual manner, at the market price thereof in such market, and without notice of foreclosure.

PROVIDED, HOWEVER, if I shall pay said debt and interest, then this mortgage shall be void; but if default be made in the payment of any of said notes, or any installment thereof or if I abuse, or misuse, or attempt to sell, remove or otherwise dispose of said mortgaged property, or any part thereof, or fail to take proper care thereof, or if said property or any part thereof shall be seized by process of law; or if at any time the said mortgagee shall deem himself insecure, then the said mortgagee, or his agent is hereby authorized to declare the whole debt due and to enter upon the premises whereon said property, or any part thereof, may be, and take, remove, and sell the same at public or private sale, without notice and without demand of performance, at which sale the mortgagee may become the purchaser, and out of the proceeds the said mortgagee is hereby authorized to retain such amount as shall be sufficient to satisfy the said indebtedness, Ten Dollars ($10) attorney's fees, and such expenses as shall have been necessarily incurred in the seizure, keeping and sale of said property, returning to me or my representatives any surplus, and if the proceeds of such sale are insufficient to satisfy said debt and interest, I agree to pay any deficiency. It is agreed that the said mortgagee retains in force all mortgages heretofore given, securing the same or any part of said indebtedness. It is further agreed that I am to remain in peaceable possession of said property until default in the conditions of this mortgage, and in consideration therof I agree to keep the same in good condition at my own cost.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 7th day of October, 1936.

)
IN PRESENCE OF )
)
J. D. Hall )
)
..... )

Two
Witnesses
Necessary

C. F. Andrews (SEAL)
..... (SEAL)
..... (SEAL)

ASSIGNMENT

FOR A VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged, the undersigned hereby assigns and transfers to .....
whose postoffice address is .....,
all right, title and interest in and to the within chattel mortgage and the property therein mortgaged.

In PRESENCE OF

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Dated at .....19.....

..... (Seal)"

Your inquiry is as follows:

"I don't know whether this is a new or second hand tractor. I don't know whether it is a sale to Andrews or whether Andrews gave Taylor Tractor & Implement Co. a mortgage on this tractor that he already owned for fertilizer or something else. I see no sign of a retention of title clause any more than is in most all mortgages, nor anything to show that this a sale of the tractor, nor anything to indicate that there might have been a down payment. But I am submitting the mortgage to you in order that you may determine whether or not in your opinion a Probate Judge, after receiving a mortgage of this type through the mail for record should collect any tax other than mortgage tax. This particular form of mortgage has been considerable trouble to me, and I feel sure that it has to several other Probate Judges of the State. One Examiner will come and say that it is nothing but a plain mortgage, then another one will come and say that I should collect mortgage and bill of sale tax and charge it to me. If this mortgage does carry a bill of sale tax I want to know it."

The Supreme Court of Alabama in **Long, Judge, v. Jasper Land Company,** 217 Ala. 593, 117 So. 210, 211, has held that "The determination of the amount of tax to be paid on an instrument (offered for recordation) is left to the Probate Judge."

An examination of the instrument submitted by you reveals that on its face it is merely a mortgage. It does not appear from the face of the instrument that same is a conditional sale contract. As stated in **Thompson, Probate Judge v. Smith,** 174 So. 796; Cert. Den. by the Supreme Court of Alabama in **Thompson v. Smith,** 174 So. 797, the Probate Judge "may accept as prima facie correct the recitals of the deed (or mortgage, we interpolate) * * * and may act accordingly, **in the absence of any fact or circumstances to the contrary, coming to his attention calculated to put on notice a reasonably prudent person."**

If as you say, however, you are persuaded that the instrument submitted to you is so drawn as to avoid the payment of a tax and to disguise the real transaction, you are within your rights in ascertaining whether or not there was in a fact a sale entered into between the parties and whether or not a cash payment was made on the purchase price of the article described in the instrument offered for recordation at the time of its purchase. Having ascertained by inquiry that there was in fact a sale and there was a cash payment, it becomes your duty to govern yourself by such information in determining upon the amount of tax which is to be imposed.

Your attention is especially directed to the opinions of the Supreme Court and of the Court of Appeals in the case of **Thompson v. Smith,** 174 So. 796, 797, supra, which opinions are especially enlightening on the subject at hand.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 29, 1937

Hon. Chas. W. Lee,
State Comptroller,
Montgomery, Alabama.

Fine and Forfeiture Funds—illegal or partially illegal claims for officers fees issued on the Fine and Forfeiture Funds are chargeable against such officers only after payment of such illegal certificates.

Opinion by Assistant Attorney General Park.

Dear Sir:

I have your letter of inquiry in which you request my opinion as follows:

"When a Circuit Clerk or Sheriff issues a certificate on the Fine and Forfeiture Fund for officers fees and the claim or any part of the claim is illegal, is it then a charge against the officer or does it become a charge when the certificate is paid?"

I have carefully considered the question raised in your letter and I am of the opinion that where a Circuit Clerk or a Sheriff makes an illegal claim against a Fine and Forfeiture Fund, such illegal claim does not become a charge against the officer until the certificate has been paid.

It is my conclusion that until an illegal claim has been paid, there is nothing for which the offending officer is chargeable. If the error is discovered before payment, however, it would be commendable to bring it to the attention of the officer in order to permit him to withdraw his illegal claim.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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December 29, 1937

Hon. Chester Walker,
Probate Judge,
Tuscaloosa County,
Tuscaloosa, Alabama.

Sheriffs—Authority of the county governing body to employ counsel in civil litigation.

Under Section 10 of Local Acts, Special Session, 1936, page 53, the county governing body of Tuscaloosa County is authorized to pay reasonable compensation of counsel, employed with the consent or ratification of such county governing body, to represent the sheriff in civil litigation.

Circuit Solicitor may not contract with the county to represent the sheriff in civil litigation and be paid therefor from county funds.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Receipt is acknowledged of your request for opinion as follows:

"I am enclosing herewith copy of a bill presented by Messrs. Foster, Rice and Foster, Attorneys at Law, for services rendered by them to Festus M. Shamblin, Sheriff, in his official capacity as such in the case of W. N. Daniel, doing business as Dixie Inn vs. H. D. Billingsley, et al. There is also enclosed a copy of Judge Foster's decree which fully sets forth the facts of the case.

"I am authorized by Judge Foster to say that when the case was first filed that at his suggestion it was turned over to the Hon. Gordon Davis, Circuit Solicitor, for handling on behalf of the respondents. That later the Sheriff talked to Judge Foster about the case and Judge Foster advised him to employ his own counsel. Then Messrs. Foster, Rice & Foster were employed in the case by the Sheriff. Foster, Rice & Foster are the regularly retained counsel of the Sheriff and are paid by the County $10.00 per month as a retainer fee, which does not include services performed by them for the Sheriff in representing him in the Court, but includes only advice deemed necessary by the Sheriff in the performance of his official duties. This retainer is paid under authority Local Acts 1936, extra session, page 53, and the case of Tuscaloosa County v. Shamblin, 169, So., 233.

"Please give me your opinion as to whether or not the bill rendered by Messrs. Foster, Rice & Foster is one which the County is authorized to pay."

I further understand from an addendum to your request that at some stage in the proceedings against the peace officers of Tuscaloosa County in their individual and official capacities, Hon. Gordon Davis, Circuit Solicitor for the Tuscaloosa County Circuit Court, was "employed" by the sheriff to assist in the litigation.

In my opinion, the county governing body of Tuscaloosa County may allow, approve and order paid the claim of Messrs. Foster, Rice & Foster, attorneys, on account of services rendered to the sheriff of Tuscaloosa County, and to his deputies, in the litigation described in your request.

Section 10 of Local Acts of 1936, extraordinary session, page 53, provides:

"That there shall be paid out of the County Treasury to the sheriff annually on the third Monday in January of each year the sum of $——— to be used by the sheriff for the purchase and maintenance of such automobiles or motor vehicles as shall be necessary to the efficient performance of the duties of the sheriff, and for such other lawful expenses not otherwise provided for herein, including the payment of attorney's fees to an attorney or attorneys to advise and represent him in his official capacity as such sheriff, and for any other legal services rendered to him in his official capacity by such attorney or attorneys, provided, however, that if such fund shall not be expended in the twelve months immediately following said third Monday in January in which it is paid, the amount remaining unused of such fund shall be by the sheriff paid back into the general fund of the County."

This provision of law has been construed by the Supreme Court in Tuscaloosa County v. Shamblin, 169 So. 234.

Speaking to the question (there being there involved the right of the County to furnish to the sheriff transportation by automobiles in the necessary performance of the duties of his office), the court said:

"It is not here contended by or for the sheriff that as thus enacted the county should place in his hands each year any sum to be so used.

but that it and other features of the act should be so construed as to require the county to furnish such equipment as automobiles and pay for their maintenance. It is certainly inoperative in so far as an amount must be thus appropriated and paid to the sheriff for that purpose; and no contention to the contrary is here made. But it shows a purpose to include such equipment as a part of the expense of operating the office provided for in general terms in section 9 of the act, in line with the idea that the present day administration of the sheriff's office requires its use (Citing cases)

"As it remains, the act does not give the unrestricted power to the sheriff to buy such equipment, and force the county to pay for it. But we think it means that the county must provide such equipment, exercising the judgment of its governing board in respect to the details, in cooperation with that of the sheriff.

"In this respect there is a stipulation between the parties that a certain amount is reasonable and satisfactory to such board as the purchase price of three certain used cars, and that they should be purchased and paid for in that amount, and likewise as to certain other items for fuel in their use, and repairs to them while so engaged, provided the act in question is valid and provided it is thereby made the duty of the county to supply such equipment and expense."

So that, to the extent that representation of the sheriff in the described litigation was necessary, the county governing body may allow and pay the reasonable value of such representation.

The claim or demand of Solicitor Davis, except for a statute prohibiting such contracts, might rest on the same consideration. However, Section 5024 of the Code of 1923 provides:

"Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county office who takes any contract for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months. But nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers."

If Solicitor Davis took employment from Tuscaloosa County to represent the interest of the sheriff in such litigation, and claimed compensation therefor, it would constitute such a "contract for work or services for the county, or * * * employment in any way under such contract" as is inhibited by the above quoted section.

For that reason, it is my opinion that the county governing body may not lawfully allow any claim of Solicitor Davis for compensation for services rendered by him representing the sheriff in the litigation described in your request.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

December 30, 1937

Hon. Frank N. Julian,
Supt. of Insurance and
Ex-Officio State Fire Marshal,
CAPITOL.

Whenever a deputy fire marshal is summoned to attend at a witness in any criminal case in the state and receives a certificate for his mileage and per diem, this becomes property of the individual witness and does not have to be covered into any fund of the state.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 8, 1937, in which you request my opinion as follows:

"Frequently in the course of discharging the duties assigned to the Deputies State Fire Marshal upon completion of investigations they are summoned by subpoena as witnesses in the trial of criminal cases arising from the results of their work.

"The question we are requesting advice on is:

"(1) Whether or not each deputy upon rendering this service as a witness is entitled to claim his per diem and mileage as a witness? If so, what disposition should be made of the amount collected?

"If you answer in the affirmative then should the amount so collected be covered in the Fire Marshal Fund under the revised State Fire Marshal Act of 1935, or does it belong to the individual Deputy State Fire Marshal for whose service as a witness it is paid?"

I am unable to find any provision of law that requires your Deputy Fire Marshal, when attending as a state witness in criminal cases and receives his certificate of attendance, to turn the amount when collected into the Fire Marshal's Fund or any other fund of the State. I find this law or certain sections of the Code pertaining to the Fire Marshal's office where amended and one section was repealed by an act approved January 24, 1935, General Acts 1935, page 5, but this act does not affect the question we have here.

Therefore, I am of the opinion when one of your deputies is summoned as a witness to attend any criminal case in Alabama, he is entitled to his mileage and per diem and he does not have to cover this into the fund of the Fire Marshal or any other fund of the State. Quarterly Report of Attorney General, Volume 3, page 35.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

# INDEX

Page

"A"

ACTS—General and Local:
GENERAL ACTS 1919:
Page 899 (Relief of Dr. John W. Abercrombie) ..... 146
GENERAL ACTS 1927:
Page 45 ..... 18
GENERAL ACTS 1931:
Page 303 ..... 44
Page 377 (Section 21½) ..... 159
Page 550 ..... 54
Page 687 ..... 90
Page 759 ..... 66
GENERAL ACTS 1935:
Page 104 (Milk Control Law) ..... 154
Page 180 ..... 115
Page 256 ..... 32
Page 256 ..... 131
Page 256 ..... 134
Page 272 ..... 134
Page 594 ..... 15
Page 691 ..... 45
Page 762 ..... 84
Page 801 ..... 166
Page 803 ..... 26
Page 803 ..... 39
Page 916 ..... 169
Page 950 ..... 87
Page 1092 ..... 116
GENERAL ACTS 1936:
Page 109 ..... 25
Page 168 ..... 74
Page 167 ..... 87
Page 225 ..... 87
Page 228 ..... 87
GENERAL ACTS 1936-37:
Page 113 (See homesteads)
Page 125 (See Sales Tax)
Page 179 ..... 11
Page 179 ..... 142
Page 183 ..... 66
Page 203 ..... 57
Page 210 ..... 140
Page 230 ..... 74
Page 268 ..... 9
Page 277 ..... 132
LOCAL ACTS 1886-1887:
Page 670 ..... 64
LOCAL ACTS 1907:
Page 82 ..... 160
LOCAL ACTS 1915:
Page 394 ..... 106

**INDEX—Continued**

Page

LOCAL ACTS 1919:
Page 38 ..... 106
Page 42 ..... 106
LOCAL ACTS 1927:
Page 143 ..... 152
Page 191 ..... 106
Page 332 ..... 82
Page 381 ..... 26
LOCAL ACTS 1931:
Page 625 ..... 64
LOCAL ACTS 1932:
Page 113 ..... 26
LOCAL ACTS 1935:
Page 24 ..... 19
Page 76 ..... 83
Page 135 ..... 35
Page 228 ..... 45
LOCAL ACTS 1936:
Page 53 ..... 174
Page 61 ..... 37
LOCAL ACTS 1936-37:
Page 36 ..... 6
Page 37 ..... 6

ALABAMA BEVERAGE CONTROL ACT:
Bonds of officers seizing liquors ..... 96
Condemnation, forfeiture of forthcoming bond ..... 100
Officer seizing liquor, liability on bond ..... 96
Population, method of determining in issuing licenses ..... 78
Refilling stamped bottles ..... 111
Stamped liquors, other than beer, in cafe having beer license in dry county ..... 96
Suspended sentence in liquor case, second offense ..... 94
Storage of prohibited liquors ..... 136
Transportation of illegal liquors ..... 96
Veteran not exempt from payment of license ..... 47

ALABAMA COLLEGE:
Child of non-resident Army Officer, college registration fee ..... 5
College not liable for tort of officer ..... 62

ATTORNEYS:
Employment of, by county in civil suit ..... 174
Judge of Probate, employing ..... 131

AUTAUGA COUNTY:
Registration of solicitors' warrants under local act ..... 35

"B"

BAIL:
Appearance bond, non-support case ..... 110

BOARD OF PHARMACY:
Physician as partner, owning or operating drug store ..... 159

BOARD OF REGISTRARS:
Notice of election, payment for ..... 120

**INDEX—Continued**

Page

BONDS:
Condemnation, forfeiture of forthcoming bond in liquor case ..... 100
Appeal bond in criminal case, liability for costs or forfeiture ..... 53
Appearance bond, non-support case ..... 110
BUDGET ACT:
Advance from general fund for outstanding debts, may be repaid by refunding warrants ..... 39
Claims of local registrars for gathering vital statistics ..... 74
County must appropriate necessary funds ..... 74
State—appropriations must be paid in full if moneys available ..... 41
BULLOCK COUNTY:
Salary of County Solicitor and Deputy Solicitor ..... 82

"C"

CHILTON COUNTY:
Relief bill for tax collectors ..... 6
CLERK OF THE CIRCUIT COURT:
Date of remission of trial tax to treasurers ..... 32
Failure to issue execution for costs ..... 18
Fees of clerk for making transcript ..... 49
CLERK OF COUNTY COURT:
Preliminary investigation, fees ..... 9
CODE OF ALABAMA, 1923:
Section 1 ..... 53
Section 37 ..... 49
Section 39 ..... 49
Section 40 ..... 49
Section 303 ..... 35
Section 366 ..... 165
Section 1351 ..... 112
Section 1357 ..... 161
Section 2690 ..... 134
Section 3028 ..... 124
Section 3382 ..... 53
Section 3657 ..... 108
Section 3667 ..... 9
Section 3762 ..... 125
Section 4621 ..... 94
Section 4622 ..... 94
Section 4625 ..... 94
Section 4639 ..... 136
Section 4644 ..... 94
Section 4685 ..... 96
Section 4713 ..... 136
Section 4039 ..... 18
Section 5287 ..... 18
Section 5522 ..... 82
Section 6108 ..... 91
Section 6755 ..... 66
Section 6755 ..... 80
Section 6108 ..... 30
Section 6670 ..... 18
Section 7020 ..... 161
Section 7197 ..... 161

**INDEX—Continued**

Page

Section 7235 ..... 50
Section 7283 ..... 30
Section 7285 ..... 23
Section 8684 ..... 18
Section 9604 ..... 23

CHOCTAW COUNTY:
Fines payable in officer's script ..... 64

COLBERT COUNTY:
Natchez Trace Parkway ..... 66

CONDEMNATION:
Counties, rights of way for public roads, expenses of ..... 151
Forfeiture of forthcoming bond in liquor case ..... 100

CONSTITUTION OF 1901:
Section 158 ..... 83

CONSTITUTIONALITY:
Acts 1919, p. 899. (Relief of Dr. John W. Abercrombie) ..... 146
Acts 1935, p. 950 (Section 2 (f) Unemployment Compensation Law) ..... 87
Local Acts 1936-37, p. 36 (Relief of J. T. Rockett) ..... 6
Local Acts 1936-37, p. 37 (Relief of W. G. Culp) ..... 6

CONTRACTS:
Sumter Board of Education and Allison Lumber Company ..... 12

CONVICT DEPARTMENT:
Witness fees, part paid by convict department ..... 108

CORPORATIONS:
Foreign corporation as executor of estate ..... 31
Foreign corporation, franchise fee differentiated from entrance fee and permit fee ..... 31

COSTS:
Clerk of Circut Court, failure to issue execution for costs ..... 18
Court without power to impose belated sentence on prosecutor for costs 18
Date of remission of trial tax to treasurers ..... 32
Non-collectible costs when taxed against prosecutor ..... 18
Suits involving license or ad valorem taxes, when taxed against state ..... 21

COSTS AND FEES:
Defendant pleading guilty and sentenced between terms of court ..... 50
Mileage, always five cents per mile ..... 125
Witness fees part paid by convict department ..... 108

COUNTIES:
Advance from general fund for outstanding debts, repaid by refunding warrants ..... 39
Appropriation for exhibit of agricultural resources ..... 80
"Assessment" against county property for paving ..... 11
Card index for superintendent of education, payment for ..... 90
Custodian of school funds, supplies ..... 28
Damages, not liable for when caused by negligent maintenance of highway ..... 14
Damages, not liable for injuries sustained on bridge ..... 14
Equalization and adjustment of taxes, payment of agent ..... 54
Macon County, Judge of Inferior Court, vacancy ..... 83
Mobile County, Inferior Criminal Court, payment of substitute judge ..... 160
Moneys transferred from general fund, to gas fund ..... 112
Piano, no authority to purchase for courthouse ..... 35

**INDEX—Continued**

Page

Sales tax, rent for resettlement administration office ... 93
Tort of employee, under facts not liable ... 14
Tuscaloosa County, employment of attorney in civil suit ... 174

COUNTY BOARD OF EDUCATION:
Traveling expenses of board member making necessary trip for Federal loan ... 57
Traveling expenses of teacher sent to Peabody College in furtherance of minimum program ... 57

COUNTY COURT:
Minutes may be on printed form ... 53

COUNTY FINANCIAL CONTROL ACT:
(See Budget Act)

COUNTY SUPERINTENDENT OF EDUCATION:
Card index, payment for ... 90
Free text book, allowance for handling ... 15

COURT OF COUNTY COMMISSIONERS:
Appropriation to maintain exhibit of agricultural resources ... 80
Attorney, employment of ... 131
Condemnation of rights of way for public roads, expenses of ... 151
Donation to horse show for benefit of crippled children ... 145
Madison County, supplies purchased by individual members ... 33
Natchez Trace Parkway, county may acquire land and convey to Federal Government ... 66
Piano, no authority to purchase for courthouse ... 35
Purchasing Agent, power to appoint ... 106
Rent for resettlement administration office ... 93
(See Counties)
Roads in excess of current year appropriation, district expense ... 22
Tuscaloosa County, gas not furnished to members ... 152

CUSTODIAN OF COUNTY SCHOOL FUNDS:
County liable for necessary supplies furnished ... 28

"D"

DALLAS COUNTY:
Horse show, donation to, by county ... 145

DEPARTMENT OF AGRICULTURE:
State parks, disposition of funds from operation of ... 166

"E"

ELECTIONS:
Agricultural program, unofficial questions included on ballot ... 115
Appointment of officer to fill vacancy (Judge of Inferior Court of Macon County) ... 83
County school tax, one mill and three mill taxes may be voted on same day ... 72
Notice of, payment for ... 120
Registration of CCC boys ... 165

ELMORE COUNTY:
Card index for Board of Education ... 90
Fee of sheriff attending county court ... 19

EXECUTORS AND ADMINISTRATORS:
Funeral expenses, use of church ... 86

**INDEX—Continued**

Page

EXEMPTIONS:
Hospital, exclusively for charity ..... 122
Insane person claiming homestead ..... 168
Veteran, Alabama Beverage Control license ..... 47
(See homesteads)

"F"

FEES:
Clerk of county court, preliminary investigation ..... 9
Clerk, for making transcript where case reversed and defendant found guilty ..... 49
Corporations, franchise, entrance, permit ..... 31
Fire Marshal serving as state witness ..... 177
Judge of Probate, five dollars from non-resident selling automobiles ..... 57
Judge of Probate, printing of certain forms for permanent record ..... 23
Land agent, commission on installments for redemption of property ..... 169
Prosecutor entitled to fees and mileage ..... 65
Sheriff of Elmore attending county court ..... 19
Solicitor's, in conviction of person treating human being of disease without license ..... 24

FILING TAX:
Alabama Cooperative Finance Corporation ..... 76
Duty of Judge of Probate to determine whether instrument mortgage or deed ..... 171
Particular instrument held mortgage ..... 171
Tax on instrument to be determined by Judge of Probate ..... 171

FINANCIAL CONTROL ACT:
(See Budget Act).

FINE AND FORFEITURE FUND:
Fines in Choctaw County payable in officer's script ..... 64
Illegal claims against ..... 174
Non-collectible costs when taxed against prosecutor ..... 18
Witness fees, part paid by convict department ..... 108

FIRE MARSHAL:
Fee and mileage, when serving as state witness ..... 177

FORFEITURES:
Appearance bond, non-support case ..... 110
Appearance bond, liability for costs ..... 53

FRANKLIN COUNTY:
Elections, Agricultural program, unofficial questions included on ballot ..... 115

FUNDS:
Advance from general fund for outstanding debts, repaid by refunding warrants ..... 39
Appropriations must be paid if moneys available in State Treasury ..... 41
Full payment of appropriations must be made if funds available ..... 68, 102
Old accounts collected by Livingston State Teacher's College, use of ..... 121
Taxation from lubricating oil, state general fund ..... 142
Tax Assessor, surplus in fund for clerical help ..... 134

"G"

GAMING:
Money not contraband and subject to seizure ..... 20

**INDEX—Continued**

Page

GASOLINE FUND:
Condemnation of rights of way for public roads, expenses of ..... 151
Counties, moneys transferred from general fund to gas fund ..... 112
Taxes from lubricating oil, not a part of ..... 142
GASOLINE TAX:
Paving city streets, payment therefor ..... 11
GROSS RECEIPTS:
Paint for repair of ships ..... 129
Ship chandlers, sale of groceries ..... 129

"H"

HEALTH AND HEALTH DEPARTMENT:
(See Public Welfare).
Balance of pro-rated funds payable at end of year if funds available ..... 68, 102
Dogs vaccinated by any competent veterinarian ..... 74
Indigents, drugs ..... 74
Indigents, hospitalization ..... 84
HIGHWAYS:
(See roads and bridges)
HIGHWAY DEPARTMENT:
Taxes from lubricating oil ..... 142
Utility company clearing trees on right of way of state highway ..... 161
HOMESTEADS:
Exemption must be claimed to be allowed ..... 10
Exemption may be claimed by agent ..... 10
Insane persons claiming ..... 168
Owner cultivating but not residing thereon ..... 63
Property subject to exemption from 1937 taxes sold to state for 1936 taxes, exemption not loss ..... 127
Time within which claims must be made, 1936-1937 taxes ..... 40
Variance between name of exemptioner and name in which property assessed ..... 113
HOSPITALS:
Taxation, used exclusively for charity ..... 122
HOUSTON COUNTY:
Title to school building when land reverts to original owner ..... 81

"I"

INSANE PERSONS:
Homestead exemption ..... 168
INTOXICATING LIQUORS:
Forfeiture of forthcoming bond ..... 100

"J"

JEFFERSON COUNTY:
Clerk of the Court of Felonies and Misdemeanors, civil service ..... 45
Solicitor of Court of Felonies and Misdemeanors, civil service ..... 45
JUDGES OF PROBATE:
Attorney, employment of ..... 131
Duty to determine whether instrument mortgage or deed ..... 171
Executors and Administrators, funeral expenses, use of church ..... 86
Fees for collecting five dollars from non-resident selling automobiles ..... 57
Printing of certain forms for permanent record ..... 23

**INDEX—Continued**

Page

"L"

LAND AGENT:
Commission on installments for redemption of property ..... 169
LICENSE TAGS:
Motor vehicles, farmerall and trailer ..... 126
Purchaser of used automobile which has been cited for tag ..... 118
LICENSES:
Beauty parlor operators ..... 91
Discounting or buying conditional sales contract (employing $500,000 capital ..... 104
Freight agent for out of state railroad ..... 163
Motor vehicles, farmerall and trailer ..... 126
Mule ..... 38
Purchaser of automobile which has been cited for tag ..... 118
Transient vendor ..... 132

"M"

MACON COUNTY:
Judge of Inferior Court, vacancy, how filled ..... 83
MADISON COUNTY:
Court of County Commissioners, supplies purchased by individual members ..... 33
MILITARY CODE:
Section 17, traveling expense, members of military and naval establishments ..... 25
MILK CONTROL BOARD:
Person procuring milk outside of milk shed and distributing it within milk shed ..... 154
MOBILE COUNTY:
Inferior Criminal Court, payment of substitute judge ..... 160
County treasurer protected on bond for payment under local act ..... 37
MONROE COUNTY:
Clerical help in office of superintendent of roads and bridges, payment of ..... 106
Purchasing Officer, payment of ..... 106
Road Foreman, payment of ..... 106
Superintendent of county roads and bridges, payment of ..... 106
MONTGOMERY COUNTY:
Provision for paying representative of State Tax Commission ..... 54
MORTGAGE:
Alabama Cooperative Finance Corporation ..... 76
Judge of Probate determines amount of tax due on instrument submitted for filing ..... 171
MOTOR CARRIER ACT, 1931:
Mileage tax lien superior to purchase money mortgage ..... 44
MOTOR VEHICLES:
"Farmerall" and trailer license ..... 126
Purchaser of used automobile which has been cited for tag ..... 118
Purchaser of automobile, the tag on which is out of date ..... 118
State Tax Commission, rules and regulations, authority to make concerning motor vehicles ..... 77

**INDEX—Continued**

Page

"O"

OFFICERS:
Alabama College not liable for tort of ... 62
Appointment of officer to fill vacancy holds only to next election ... 83
Bond of officer seizing liquor ... 100
Civil service, solicitor and clerk, Jefferson County Court of Felonies and Misdemeanors ... 45
Illegal claims against fine and forfeiture fund, when charged against ... 174
Payment under void act protected on bond ... 37

"P"

PHARMACISTS:
Physician as partner owning or operating drug store ... 159
PHYSICIANS AND SURGEONS:
Owning or operating drug store as partner ... 159
PUBLIC WELFARE:
(See Health Department)
Indigents, drugs ... 74
Indigents, hospitalization ... 84
Rabies, vaccination of dogs ... 74

"R"

RABIES:
Dogs may be vaccinated by any competent veterinarian ... 74
REGISTER OF CIRCUIT COURT:
Fees for office copy of transcript prepared for appeal ... 30
Transcript, not required to keep ... 91
REGISTRATION:
CCC boys ... 165
REVENUE ACT, 1935:
Section 348, Schedule 72 ... 38
Section 2 ... 168
Section 348, Schedule 137 ... 163
Section 350 (a) ... 38
Section 353 ... 118
Section 348, Schedule 92½ ... 104
Section 348, Schedule 230 ... 132
Sections 35 - 35-A ... 134
Section 365 ... 140
Section 348, Schedule 106 ... 140
Section 384 ... 21
Section 348, Schedule 21 ... 91
REVENUE CODE, 1936:
(See Revenue Act, 1935)
RIGHTS OF WAY:
Condemnation by county, expenses of ... 151
Unnecessary damage to trees on ... 161
Utility company clearing trees on right of way on state highway ... 161
ROADS AND BRIDGES:
Building roads in excess of appropriation, payment therefor ... 22

**INDEX—Continued**

Page

"S"

SALES TAX:
Burial expenses of paupers ... 56
Cotton seed meal used for fertilizer ... 29
Insane persons, medical attention ... 56
Prisoners, medical attention ... 56
Rent for resettlement administration office ... 93
Telephone service, Welfare Department ... 56
SCHOOLS:
Board of Trustees may refuse to accept assignment of teacher ... 51
Child of non-resident officer, college registration fee ... 5
County school tax, one mill and three mill taxes may be voted on same day ... 72
County liable for necessary supplies furnished Custodian School Funds ... 28
District School tax, in Sumter County, contract between County Board of Education and Allison Lumber Company ... 12
Free text books, allowances for handling ... 15
Funds, old accounts, collected, use of ... 121
Incidental fees, grammar and high schools ... 116
Minimum program fund, certain expenses allowed ... 57
Teacher accepting employment after refusal of assignment by board ... 51
Title to school building when land reverts to original owner ... 81
Traveling expenses of teachers sent to Peabody College in furtherance of minimum program ... 57
Traveling expenses of board member making necessary trip for federal loan ... 57
SCHOOL CODE:
Section 180 ... 51
Section 182 ... 116
Section 280 ... 12
Section 510 ... 5
SCRIPT:
Fines in Choctaw County payable in officer's script ... 64
SHERIFFS:
Condemnation, forfeiture of forthcoming bond in liquor case ... 100
Fee for attending county court in Elmore ... 19
No authority to seize money as contraband in poker game ... 20
Witness, entitled to witness fee and mileage ... 65
SOLICITORS:
Bullock County, salary ... 81
Fee, prosecution of person without license treating human being of disease ... 24
Registration of warrants under local act for Autauga County ... 35
STATE BOARD OF MEDICAL EXAMINERS:
Person convicted of treating human beings of disease without license, solicitor's fee ... 24
STATE COMPTROLLER:
Full payment of appropriations must be made if funds available ... 68, 102
No authority to accumulate balance by not paying all lawful appropriations ... 41
STATE PARKS:
Receipts from operation of, disposition of ... 166

**INDEX—Continued**

Page

STATE TAX COMMISSION:
Equalization and adjustment of taxes, agent, payment of 54
Rules and regulations, authority to make concerning motor vehicles 77
STATE TEACHER'S COLLEGE:
Old accounts collected, use of funds 121
SUMTER COUNTY:
School district tax, contract between county board of education and Allison Lumber Company 12
SUSPENDED SENTENCE:
Second offense in liquor case 94

"T"

TAXATION:
Ad Valorem taxation, Alabama State Fair Association 124
"Assessment" against county property for paving 11
Exemption for homestead and for insane person cumulative 168
Fair grounds, Alabama State Fair Association 124
Hospital, exclusively charitable 122
Land agent, commission on installments for redemption of property 169
Lubricating oil, state general fund 142
Mileage tax lien superior to purchase money mortgage 44
Net license used in calculating percentage 140
Equalization and adjustment of taxes, agent, payment of 54
Suits involving license or ad valorem taxes, when taxed against state 21
TAX ASSESSORS:
Surplus from fund for clerical help 134
TAX DEED:
Tax sale, executor seeking to redeem property 138
TAX SALE:
Executor seeking to redeem property 138
TAXES:
County school tax, one mill and three mill taxes may be voted on same day 72
TRAILERS:
Motor vehicles, "Farmerall" and trailer 126
TRANSCRIPT:
Fees of clerk for making where case reversed and defendant later found guilty 49
Register of Circuit Court not required to keep 91
Register of Circuit Court, not authorized to charge for office copy 30
TRIAL TAX:
Contempt for failure to pay alimony 17
Day of remission to treasurers 32
TUSCALOOSA COUNTY:
Board of Revenue, gas not furnished to members 152
Employment of attorney in civil suit 174

"U"

UNEMPLOYMENT COMPENSATION:
Several businesses having common majority ownership 87

**INDEX—Continued**

Page

UNITED STATES ARMY:
Child of non-resident officer, college registration fee ..... 5

"V"

VETERANS:
License, Alabama Beverage Control ..... 47

"W"

WALKER COUNTY:
Advance from general fund for outstanding debts, may be repaid by refunding warrants ..... 39
Judge of County Court, compensation of special judge ..... 26
Judge of County Court, not authorized to draw own warrants ..... 26
WILLS:
Redemption of property governed by terms of will ..... 138
WITNESSES:
Attendance must be proved within five days ..... 50
Clerk without authority to collect five cents and pay four cents mileage 125
Fire Marshal when serving as state witness, fees and mileage ..... 177
Prosecutor entitled to fees and mileage ..... 65
WITNESS FEES:
Convict Department paying certain fees, payment of balance ..... 108
WORDS AND PHRASES:
"Annual license herein levied," percentage of ..... 140